Court 2. 15-~~197~~ 15-151
for Judge Story
Judge Swayne
RE argument

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~152~~ ~~22~~ ~~44~~ 74

CHARLES SHUTTE, PLAINTIFF IN ERROR,

vs.

URIAH THOMPSON ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED MAY 7, 1870.

Dec. J. 1870

SUPREME COURT OF THE UNITED STATES.

No. 453.

CHARLES SHUTTE, PLAINTIFF IN ERROR,

vs.

URIAH THOMPSON ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the district court of the United States for the district of West Virginia, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you between Uriah Thompson, plaintiff, and Charles Shutte, defendant, a manifest error hath happened, to the great damage of the said Charles Shutte, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seals, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause

2 further to be done therein, to correct that error, which of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 30th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and Jasper Y. Moore, clerk of the said district court.

[SEAL.]

JASPER Y. MOORE,
Clerk D. C. U. S. for D. W. V.

Allowed by—

JOHN J. JACKSON, JR.,
Judge of the District Court of the United States for the District of West Virginia.

3 This writ of error was produced by Charles Shutte, named therein, and deposited in the district court therein mentioned, on the 30th day of March, in the year of our Lord 1869; and the said writ was served by a copy thereof being lodged for Uriah Thompson, the adverse party, in the clerk's office of the said court, where the record of the case therein mentioned remains, on the day last mentioned, within ten days after rendering the judgment complained of.

Test:

JASPER Y. MOORE,
Clerk D. C. U. S. for D. W. V.

(Indorsed:) Uriah Thompson vs. Charles Shutte. Writ of error.

4 The United States of America to Uriah Thompson, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of West Virginia, wherein Charles Shutte is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jackson, jr., judge of the district court of the United States for the district of West Virginia, this 30th day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

JOHN J. JACKSON, JR.

5 (Indorsed:) Uriah Thompson vs. Charles Shutte. Citation.

UNITED STATES OF AMERICA,
District of West Virginia:

On this 28th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, personally appeared Jasper Y. Moore before me, the subscriber, a commissioner appointed by the district court of the United States for the district of West Virginia to take bail and affidavits, and makes oath that he this day delivered a true copy of the within citation to Benjamin H. Smith, attorney for the plaintiff, Uriah Thompson, in the district court of the United States for the district of West Virginia, and defendant in error, as appears by the docket of the said district court, on which the name of the said Benjamin H. Smith appears as attorney for the said Uriah Thompson, and as is known to him, the said Moore, personally.

JASPER Y. MOORE.

Subscribed & sworn to before me, the said commissioner, the day and year above mentioned.

W'M H. HOGEMAN,
U. S. Commissioner.

6 Know all men by these presents that we, Charles Shutte and Mortimer C. Boggess, are held and firmly bound unto Uriah Thompson in the sum of one thousand dollars; to the true payment of which we bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 30th day of March, in the year of our Lord 1869.

The condition of the above obligation is such, that whereas the above-bound Charles Shutte now obtains from the Honorable John J. Jackson, jr., judge of the district court of the United States for the district of West Virginia, a writ of error to a judgment of the said court, rendered on the 29th day of March, in the year of our Lord 1869, in favor of the said Uriah Thompson against the said Shutte, and the said judge now signs a citation upon the said writ:

Now, if the said Charles Shutte shall prosecute the said writ to effect, and answer all damages and costs if he fail to make his plea good, then this obligation to be void; otherwise to remain in full force.

(Signed) CHARLES SHUTTE. [SEAL.]
(Signed) MORTIMER C. BOGGESS. [SEAL.]

7 Taken, approved, and deemed sufficient by me, the judge, in the foregoing bond mentioned, on the day of the date thereof, at the time of my signing the citation therein mentioned.

(Signed) J. J. JACKSON, JR.,
Judge D. C. U. S. D. W. V.

A copy. Test: JASPER Y. MOORE,
Clerk D. C. U. S. for D. W. V.

8 (Indorsed:) Uriah Thompson vs. Charles Shutte. Bond. Delivered to the clerk of the district court of the United States for the district of West Virginia on this 30th day of March, 1869.

Test: JASPER Y. MOORE,
Clerk D. C. U. S. for D. W. V.

A copy. Test: JASPER Y. MOORE,
Clerk D. C. U. S. for D. W. V.

9 UNITED STATES OF AMERICA, *ss:*

In the district court of the United States for the district of West Virginia, at Clarksburg.

Pleas before the Honorable John J. Jackson, junior, judge of the said court, on the 26th day of March, A. D. 1869.

Be it remembered that heretofore, to wit, at rules, held in the clerk's office of the United States district court for the western district of Virginia, at Wheeling, Ohio County, for the month of January, 1860, came Uriah Thompson, a citizen of the State of Ohio; the Oberlin College, a body politic and corporate, created by the State of Ohio, residing and doing business therein, and exercising its corporate powers, franchises, and privileges therein, and a citizen thereof; and Chapman Biddle, and Mary L. C. Biddle, his wife, citizens of the State of Pennsylvania; and Walter L. Cochran, John Cochran, Ellen Walter, W'm Kenneys, Catharine Kenneys, Gerrit Smith, Cornelia S. Barclay, and Gerrit H. Smith, all citizens of the State of New York; and James W. Cochran, a citizen of the State of Illinois; and A. Baird, and Cornelia W. Smith, his wife, citizens of the State of Louisiana, plaintiffs, by their attorney, and filed their declaration against Charles Shutte and Lemon P. Bonnell,
10 citizens of the State of Virginia, defendants, with a notice in writing thereto subjoined by the plaintiffs' attorney, addressed to the defendants, and notifying them that the said declaration would be filed on this day; together with an affidavit of the service of the declaration and notice aforesaid. Whereupon, it appearing by said affidavit that the said Charles Shutte and Lemon P. Bonnell have each been duly served with a copy of the declaration and notice thereto subjoined, and they not appearing, it is ordered that unless they, having legal notice of this order, do appear before the judge of our said court on the first Monday in February next, and plead to the said declaration, their default will be entered and judgment given against them, and a writ of possession awarded the plaintiffs.

Which said declaration, together with the notice and proof of service filed, are in the words and figures following, to wit:

VIRGINIA:

United States district court for the western district of Virginia, holden at Wheeling, Ohio County, to wit:

Uriah Thompson, a citizen of the State of Ohio; the Oberlin College, a body politic and corporate, created by the State of Ohio, residing and doing business therein, and exercising its corporate powers, fran-
11 chises, and privileges therein, and a citizen thereof; and Chapman Biddle, and Mary L. C. Biddle, his wife, citizens of the State of Pennsylvania; and Walter L. Cochran, John Cochran, Ellen Walter, W'm Kenneys, Catharine Kenneys, Gerrit Smith, Cornelia S. Barclay, and Gerrit H. Smith, all citizens of the State of New York; and James

W. Cochran, a citizen of the State of Illinois; and A. Baird, and Cornelia W. Smith, his wife, citizens of the State of Louisiana, plaintiffs, complain of Charles Shutte and Lemon P. Bonnell, citizens of the State of Virginia, defendants:

For that they, the said pl't'ffs, heretofore, to wit, on the tenth day of September, 1854, were possessed in fee-simple, at the county of Doddridge, and within the jurisdiction of this court, of four certain tracts of land and tenements, situate in the county of Doddridge, on the waters of Middle Island; the first whereof, containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a white oak, corner to Jabez Bacon's; thence with his line north 45 degrees east 400 poles to two hickories; thence south 45 degrees east 400 poles to a black oak; thence south 45 degrees west 400 poles to a black oak, corner to said Bacon; thence with his line north 45 degrees west 400 poles to the beginning, the same being the land mentioned and described in the patent issued to Jabez Bacon for 1,000 acres, bearing date the 29th of October, 1787, and marked on the back thereof No. 14. And the
12 second whereof, also containing 1,000 acres, is bounded and described as follows, to wit: Beginning at two hickories, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white walnut; thence south 45 degrees east 400 poles to a white oak; thence south 45 degrees west 400 poles to a black oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and marked on the back thereof No. 15. The third whereof, also containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a black oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white oak; thence south 45 degrees east 400 poles to a gum; thence south 45 degrees west 400 poles to a white oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 30th of October, 1787, and marked on the back thereof No. 16. And the fourth thereof, also containing 1,000 acres, is bounded and described as follows, to wit: Beginning
13 a white oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to two poplars; thence south 45 degrees east 400 poles to white walnut; thence south 45 degrees west 400 poles to two hickories, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and numbered on the back thereof 6. And, being so possessed thereof, that they, the said defendants, afterwards, to wit, on the 20th day of September, 1854, entered into the said tract of land & tenements, and unlawfully withhold possession of the same from the said plaintiffs, to their damage of 2,000 dollars.

2. And the said Uriah Thompson, a citizen of the State of Ohio as aforesaid, further complains of the said Charles Shutte and Lemon P. Bonnell, citizens of Virginia as aforesaid, for that he, the said Uriah Thompson, heretofore, to wit, on the tenth day of September, 1854, at the county of Doddridge, and within the jurisdiction of this court, was possessed of four certain tracts of land and tenements in fee-simple, situate in the said county of Doddridge, on the waters of Middle Island; the first whereof, containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a white oak, corner to Jabez Bacon; thence

with his line north 45 degrees east 400 poles to two hickories;
14 thence south 45 degrees east 400 poles to a black oak; thence south 45 degrees west 400 poles to a black oak, corner to said Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, marked on the back thereof No. 14. And the second whereof, containing also 1,000 acres, is bounded and described as follows, to wit: Beginning at two hickories, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white walnut; thence south 45 degrees east 400 poles to a white oak; thence south 45 degrees west 400 poles to a black oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, the same being the land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and marked on the back thereof No. 15. The third whereof, also containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a black oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white oak; thence south 45 degrees east 400 poles to a gum; thence south 45 degrees west 400 poles to a white oak, corner to Jabez Bacon; thence
15 with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 30th of October, 1787, and marked on the back thereof No. 16. And the fourth thereof, containing also 1,000 acres, is bounded and described as follows, to wit: Beginning at a white oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to two poplars; thence south 45 degrees east 400 poles to a white walnut; thence south 45 degrees west 400 poles to two hickories, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and marked on the back thereof 6. And, being so possessed thereof, that they, the said defendants, afterwards, to wit, on the 20th day of September, 1854, entered into the said four tracts of land and tenements in this count mentioned, and unlawfully withhold possession thereof from the said Uriah Thompson, to his damage 2,000 dollars.

3rd. And the said Chapman Biddle, and Mary L. C. Biddle, his wife, citizens of the State of Pennsylvania; and Walter L. Cochran, John Cochran, Ellen Walter, William Kenneys, Catharine Kenneys,
16 Gerrit Smith, Cornelia S. Barclay, and Gerrit H. Smith, all citizens of the State of New York; and James W. Cochran, a citizen of the State of Illinois; and A. Baird, and Cornelia W. Smith, his wife, citizens of the State of Louisiana, further complain of the said Charles Shutte and Lemon P. Bonnell, citizens of Virginia, as aforesaid, for that heretofore, to wit, on the tenth day of September, 1854, at the county of Doddridge, and within the jurisdiction of this court, they were possessed in fee-simple of four tracts of land and tenements, situate in the county of Doddridge, on the waters of Middle Island; the first whereof, containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a white oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to two hickories; thence 45 degrees east 400 poles to a black oak; thence south 45 degrees west 400 poles to a black oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and marked on the back thereof No. 14. And the second

whereof, also containing 1,000 acres, more or less, is bounded and
17 *and* described as follows, to wit: Beginning at two hickories, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white walnut; thence south 45 degrees east 400 poles to a white oak; thence south 45 degrees west 400 poles to a black oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and marked on the back thereof No. 15. The third whereof, also containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a black oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white oak; thence south 45 degrees east 400 poles to a gum; thence south 45 degrees west 400 poles to a white oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 30th of October, 1787, and marked on the back thereof No. 16. And the fourth thereof, also containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a white oak, corner to
Jabez Bacon; thence with his line north 45 degrees east 400
18 poles to two poplars; thence south 45 degrees east 400 poles to a white walnut; thence south 45 degrees west 400 poles to two hickories, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in a patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and numbered on the back thereof 6. And, being so possessed of the said last four tracts of land and tenements, that they, the said defendants, afterwards, to wit, on the 20th day of September, 1854, entered into the same, and unlawfully withhold the possession of the same from the said plaintiffs in this count mentioned, to their damage of 2,000 dollars.

4. And the said Oberlin College, being a body politic and corporate, created by the State of Ohio, and residing therein, and exercising its corporate powers, franchises, & privileges therein, and a citizen thereof, further complaining of the said Charles Shutte and Lemon P. Bonnell, defendants, and citizens of Virginia, as aforesaid, for that the said Oberlin College heretofore, to wit, on the tenth day of September, 1854, at the county of Doddridge, and within the jurisdiction of this court, was
possessed of four tracts of land and tenements in fee-simple,
19 lying and being in the county of Doddridge aforesaid, on the waters of Middle Island, the first whereof, containing 1,000 acres, more or less, is bounded and described as follows, to wit: Beginning at a white oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to two hickories; thence south 45 degrees east 400 poles to a black oak; thence south 45 degrees west 400 poles to a black oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, the same being the land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and marked on the back thereof No. 14. The second whereof, containing also 1,000 acres, is bounded and described as follows, to wit: Beginning at two hickories, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white walnut; thence south 45 degrees east 400 poles to a white oak; thence south 45 degrees west 400 poles to a black oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, the same being the land mentioned and described in the patent issued to Jabez Bacon,

dated the 29th of October, 1787, and marked on the back thereof No. 15. The third whereof, also containing 1,000 acres, is bounded
20 and described as follows, to wit: Beginning at a black oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to a white oak; thence south 45 degrees east 400 poles to a gum; thence south 45 degrees west 400 poles to a white oak, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 30th of October, 1787, and marked on the back thereof No. 16. And the fourth thereof, also containing 1,000 acres, is bounded and described as follows, to wit: Beginning at a white oak, corner to Jabez Bacon; thence with his line north 45 degrees east 400 poles to two poplars; thence south 45 degrees east 400 poles to a white walnut; thence south 45 degrees west 400 poles to two hickories, corner to Jabez Bacon; thence with his line north 45 degrees west 400 poles to the beginning, being the same land mentioned and described in the patent issued to Jabez Bacon, bearing date the 29th of October, 1787, and marked on the back thereof 6. And, being so possessed thereof, that they, the said defendants, afterwards, to wit, on the 20th day of September, 1854, entered into
21 the said four last-mentioned tracts of land and tenements, and unlawfully withhold the possession of the same from the said Oberlin College, to their damage of 2,000 dollars.

JOS. L. FRY,
For Plaintiffs.

Mr. CHARLES SHUTTE and LEMON P. BONNELL.

GENTLEMEN: You will please to take notice that the foregoing declaration in ejectment will be filed at rules on the first Monday in January, 1860, in the clerk's office of the district court of the United States for the western district of Virginia, holden in Wheeling, in the county of Ohio.

J. L. FRY, *Pl'ffs.*

NOV. 17TH, 1859.

DODDRIDGE COUNTY, *to wit:*

Samuel McMillan made oath before me, the subscriber, a justice of the peace for the said county, that he gave a true copy of the foregoing declaration and notice to Lemon P. Bonnell on the 26th day of December, 1859, and one also to Charles Shutte on the 27th day of December, 1859.

Given under my hand this 28 day of December, 1859.

JOHN SMITH, *J. P.*

22 The four patents issued to Jabez Bacon, referred to in the plaintiff's declaration, and marked Nos. 14, 15, and 16, and "6," are not found on file among the papers of this cause.

And at another day, to wit, at rules, held in the clerk's office of said court on the first Monday in February, 1860:

Came the plaintiffs by their attorney; and it appearing that the defendants have been duly served with a copy of the conditional order made in this cause, and they not appearing, it is considered that the plaintiffs recover against the defendants the land in the declaration mentioned, with the appurtenances.

And at another day, to wit, in the district court of the United States for the western district of Virginia, at Wheeling, on Thursday, the 12th day of April, 1860:

This day came as well the plaintiffs, by their attorney, as the defendants, by Benjamin Wilson, esq., their attorney; and the defendants, by their attorney, say that they are not guilty of unlawfully withholding the premises claimed in the declaration, and of this they put themselves upon the country; and the plaintiffs likewise. Whereupon, on motion of the defendants, by their attorney, it is ordered that the judgment entered in this cause at the rules be set aside. And, on motion of the plaintiffs, with the consent of the defendants, by their attorneys, it is further ordered that Daniel Sherwood, of Doddridge County, do go upon the lands in controversy, and survey and lay out the same as either party may require, and return five fair plats and reports thereof to the court; and that any one of the justices of Doddridge County do then and there meet him and examine, and take the depositions of such witnesses as shall be produced by any of the parties, which are to be returned with the said plats and reports; and the marshal is to attend the said survey and remove force, if any shall be offered. And this cause is continued until the next term.

23

And at another day, to wit, on Saturday, the 14th day of April, 1860, (being the same term:)

On motion of the defendants, by their attorney, and for good cause shewen to the court, the order of continuance heretofore entered in this cause is set aside; and it is ordered that this cause, with the papers therein, be removed for further proceedings to be had therein to Clarksburg, and the cause is continued until the next term there.

24

And at another day, to wit, at a district court of the United States for the western district of Virginia, held at Clarksburg on Monday, the 27th day of August, 1860:

25

The original papers in this cause were this day produced in court, and, it appearing that this cause was by an order of this court, made at Wheeling, remanded to this court. Whereupon, by consent of the parties, it is ordered that the same be placed upon the issue docket of this court for a trial thereof to be had.

And at another day, to wit, at a term of said court, held at the place aforesaid, on Thursday, the 30th day of August, 1860:

On motion of the plaintiffs, by their attorney, it is ordered that any authorized surveyor of this judicial district do go upon the land in controversy and survey and lay out the same as either party shall require, and return nine fair plats and four reports thereof to the court; and it is ordered that the marshal of this court attend the said survey, and remove force if any shall be offered.

And at another day, to wit, at a term of the said court, held at the place aforesaid, on Friday, August 31st, 1860:

26

This day came the parties, by their attorneys, and for reasons appearing to the court set forth in the affidavit of the defendants filed with the papers of this cause, it is ordered that, on the first day of the next term of this court here, the attorney who brought this suit, or some other person, shew that at the time of the bringing hereof the said attorney was duly authorized to bring the same in the names of the

plaintiffs, Chapman Biddle, and Mary L. C. Biddle, his wife, Walter L. Cochran, John Cochran, Ellen Walter, William Kenneys, Gerritt Smith, Cornelia S. Barclay, Gerritt H. Smith, James W. Cochran, A. Baird, and Cornelia W. Smith, his wife, and Catharine Kenneys; and that, unless he does so, this suit be dismissed as to the said plaintiffs in whose names it shall not be shown that the said attorney was so authorized to bring this suit, and that a copy of this order be served on the said attorney. The defendants suggest that the plaintiffs are not residents of the State of Virginia, and that security is required of them.

And at another day, to wit, at a term of said court, held at the
27 place aforesaid, on Saturday, September 1st, 1860:

This day came the parties by their attorneys, & moved the court for leave to withdraw the plea heretofore pleaded by them jointly, and for leave to plead severally; and the court, not being advised of its judgment, takes time to consider thereof until the next term.

And at another day, to wit, at a term of said court, held at the place aforesaid, on Wednesday, March 27, 1861:

For reasons appearing to the court, Charles Bonnell is, on his motion, admitted a defendant in this suit as landlord of Lemeon P. Bonnell, whom he, now here in court, admits to be his lessee; & it is ordered, with the consent of said Charles Bonnell, that he stand and be treated in all respects as if he had been originally a defendant, and had joined in the plea of the other defendants, and in all the other proceedings heretofore taken in this suit in their behalf.

And at another day, to wit, at a term of said court, held at the place aforesaid, on Thursday, March 28, 1861:

28 This day came again the parties by their attorneys, and, on motion of the plaintiffs, by their attorney, and for reasons appearing to the court, the order entered in this cause on yesterday is set aside. And thereupon comes the defendant Lemon P. Bonnell, in his proper person, and, relinquishing his former plea, says that he cannot gainsay the plaintiffs' action, nor but that he is guilty of unlawfully withholding the premises in the declaration mentioned, in manner and form as the plaintiffs against him have complained; and the parties agree that the plaintiffs have sustained damages by reason thereof to one cent, besides their costs. Therefore it is considered by the court that the plaintiff Uriah Thompson, the other plaintiffs assenting, recover against the said defendant Lemon P. Bonnell the premises in the declaration mentioned, together with his damages agreed as aforesaid, and his costs by him about his suit in this behalf expended. And the said defendant may be taken, &c. Whereupon the plaintiff Uriah Thompson prays a writ to the marshal of this court to be directed to cause him to have his possession of the premises aforesaid of said defendant Lemon F. Bonnell; and to him it is granted.

29 In obedience to the rule awarded in this cause at the last term, on the motion of the defendants, requiring the attorney who brought this suit, or some other person, to show cause on the first day of this term why this suit should not be dismissed as to certain of the plaintiffs in said rule named, this day comes into court Joseph L. Fry, esq., who admits himself to be the attorney who brought this suit, and declares himself ready to shew the cause required; but the attorney for the defendants, on whose motion said rule was awarded, not being present, for that and other reasons appearing to the court, with consent of parties, the rule is enlarged until the next term.

For reasons appearing to the court, on the *the* motion of the plaintiffs, the order of survey made in this cause at the last term is set aside, and it is ordered that the order of survey originally made at Wheeling do stand and be in force as if the said second order had never been made.

Joseph L. Fry, esq., of Wheeling, comes into court and gives bond in a penalty of $100, conditioned that the plaintiffs shall satisfy and
30 pay all such costs and damages as may be awarded to the defendants, and also all the fees which are or shall become due from them to the officers of this court. And this cause is continued till the next term.

31 At another day, to wit, at a term of the district court of the United States for the western district of Virginia, held at Clarksburg, on Monday, the 31st day of March, 1862:

For reasons appearing to the court, it is ordered that this cause be continued until the next term.

At other days, to wit, at terms of the district court of the United States for the western district of Virginia, held at Clarksburg on Thursday, September 4th, 1862, and on Wednesday, April 1st, 1863, respectively:

For reasons appearing to the court, it is ordered that this cause be continued until the next term.

At another day, to wit, at a district court of the United States for the western district of Virginia, held at Clarksburg on Friday, September 4th, 1863:

This day came the defendants by their attorney, and on their motion it is ordered that the plaintiffs in this cause be summoned to appear here on the first day of the next term of this court, *the* shew cause, if any they can, why this cause shall not be stricken from the docket and dismissed for their failure to execute the order of survey made
32 in this cause at a former term of this court; and it is further ordered that Daniel Sherwood, or any authorized surveyor of this judicial district, do go upon the land in controversy, and survey and lay out the same as either party may require, and return nine fair plats and four reports thereof to this court. And this cause is continued until the next term.

At another day, to wit, at another term of the said court, held at the place aforesaid, on Tuesday, April 5th, 1864:

For reasons appearing to the court, it is ordered that this cause be continued until the next term.

At another day, to wit, at a district court of the United States for the district of West Virginia, held at Clarksburg, on Thursday, September 1st, 1864:

On motion of the plaintiff, by his attorney, it is ordered that this cause be continued until the next term at his costs; but this cause is not to be continued again for the absence of the witness Underwood, or for the failure to execute the order of survey on the part of the plaintiff.

At another day, to wit, at a special term of the said court, held at Clarksburg, on Tuesday, the 7th day of February, 1865:

33 On motion of the defendants, it is ordered that Thomas Nick-

len, the recorder of the county of Tyler, be summoned to appear here on the first day of the next term of this court, and that he bring with him the land books of the commissioner of said county, from the formation of said county to the year 1845, inclusive, also the delinquent lists of the land taxes for the years aforesaid returned by the sheriff of said county; and that A. G. Robinson, the recorder of the county of Ohio, be summoned to appear here on the first day of the next term thereof, and that he bring with him the land books of the commissioner of the revenue of the said county, from the year 1785 until the year 1815, both inclusive, also the delinquent lists of the land taxes of said county returned for the years aforesaid by the sheriff of said county.

At another day, to wit, at a term of said court, held at the place aforesaid, on Wednesday, March 29th, 1865:

By consent of parties by their attorneys, it is ordered that Daniel Sherwood or Williams Maxwell, of the county of Doddridge, or either of them, do go upon the land in controversy in this cause and execute the order of survey heretofore made in the same.

34 At another day, to wit, at a term of said court held at the place aforesaid on the 29th day of August, 1865:

This day came the defendants by their attorney, and on their motion it is ordered that Thomas Nicklen, the recorder of the county of Tyler, be summoned to appear here on the 6th day of February, 1866, and that he bring with him the land books of the commissioner of said county, from the formation of said county to the year 1845, inclusive, also the delinquent lists of the land taxes for the years aforesaid returned by the sheriff of said county; and that A. G. Robinson, the recorder of the county of Ohio, be summoned to appear here on the said 6th day of February, 1866, and that he bring with him the land books of the commissioner of the revenue of the said county, from the year 1785 until the year 1815, both inclusive, also the delinquent lists of the land taxes of said county, returned for the years aforesaid by the sheriff of said county.

At another day, to wit, at a term of said court, held at the place aforesaid, on Wednesday, February 7th, 1865:

This day came the parties by their attorneys; and, on motion of the defendants by their attorney, it is ordered that this cause be con-
35 tinued until the next term, but this continuance is at the costs of the said defendants; and on the further motion of the said defendants, it is ordered that the report of Daniel Sherwood be recommitted to him, with instruction to lay down the Tyler County line.

At another day, to wit, at a term of said court, held at the place aforesaid, on Wednesday, March 28th, 1866:

This day came the parties by their attorneys, and, on motion of the defendants by their attorney, it is ordered that this cause be continued until the 20th day of August, 1866; but this continuance is at the costs of the said defendants.

At another day, to wit, at a term of said court, held at the place aforesaid, on Thursday, August 30th, 1866:

For reasons appearing to the court, it is ordered that this cause be continued until the next term.

At another day, to wit, at a term of said court, held at the place aforesaid, on Tuesday, August 27th, 1867:

This day came the parties by their attorneys, and thereupon came a jury, to wit, Edmund J. Hayes, Minor C. Hall, John D. Snodgrass,
36 Milton Norris, Cyrus Ross, Thomas S. Spates, Currence B. Conrad, William A. Gittings, Alfred Sturgis, James McConnell, Lewis L. Edwards and Cyrus Vance, all good and lawful men, who, being selected, tried, and sworn to well and truly try the issue in this cause; and, it being too late to finish the trial of the cause on the present day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

At another day, to wit, at a term of said court, held at the place aforesaid, on Wednesday, August 28th, 1867:

This day came the parties by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having partly heard the evidence, and it being too late to finish the trial of this cause on the present day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

At another day of the same term, to wit, on Thursday, August 29, 1867:

This day came the parties by their attorneys, and the jury
37 impanneled and sworn in this cause again appeared in court according to adjournment on yesterday, and having partly heard the evidence, and it being too late to finish the trial of this cause on this day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

At another day of said term, to wit, on Friday, August 30, 1867:

This day came the parties by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having partly heard the evidence, and it being too late to finish the trial of this cause on this day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

At another day of said term, to wit, on Saturday, August 31, 1867:

This day came the parties by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having partly heard the evidence, and it being too late to finish the trial of this cause on this day, the
38 jury, with the assent of the court, are adjourned over until Monday morning next at 11 o'clock.

At another day of said term, to wit, on Monday, September 2, 1867:

This day came the parties by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on Saturday last, and having further heard the evidence, and it being too late to finish the trial of this cause on this day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

At another day of said term, to wit, on Tuesday, September 3, 1867:

This day came the parties by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their

adjournment on yesterday, and having fully heard the evidence, and the argument of counsel not being concluded, and it being too late to finish the trial of this cause on this day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

39 At another day of said term, to wit, on Wednesday, September 4, 1867:

This day came the parties by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having fully heard the evidence, and the argument of counsel not being concluded, and it being too late to finish the trial of this cause on this day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

At another day of said term, to wit, on Thursday, September 5, 1867:

This day came the parties by their attorneys, and the jury sworn in this cause again appeared in court according to their adjournment on yesterday, and having fully heard the evidence, and the argument of counsel not being concluded, the jury, with the assent of the court, are adjourned over until to- morning at 8 o'clock.

At another day of said term, to wit, on Friday, September 6, 1867:

40 This day came as well the parties by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and, having fully heard the evidence and argument of counsel, retired to their chamber to consider of their verdict; and, after some time, returned into court, and, being unable to agree, and it being too late to finish the trial of this cause on this day, the jury, with the assent of the court, are adjourned over until to-morrow morning at 9 o'clock.

At another day of said term, to wit, on Saturday, September 7, 1867:

This day came the parties by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and again retired to their chamber to consider their verdict; and, after some time, returned into court, and upon their oath do say: "We, the jury, find for the plaintiff, Uriah Thompson, and we further find that the plaintiff has an estate in fee-simple to the boundary & tract of land represented on the plat marked 'A,' & filed in this cause, by the yellow shading on said plat, beginning at the two poplars at the letter G on said plat, & from thence S. 42 E. 1200 poles

41 to a gum at J; thence S. 45 W. 400 poles to a white oak; thence N. 45 W. 400 poles to a black oak; thence S. 45 W. 400 poles to a black oak; thence N. 45 W. 400 poles to white oak; thence N. 45 E. 400 poles to two hickories; thence N. 45 W. 400 poles to a white oak; thence N. 45 E. 400 poles to two poplars, at the place of beginning; which tract & boundary of land is further indicated by the four lots of said yellow shading, lettered B, C, D, & E, being the four lots of land mentioned and described in the declaration; and we further find that the said plaintiff is entitled to the possession of the said premises, and that the defendant is in the possession thereof; and, as to the other plaintiffs in the declaration mentioned, we find for the defendant." And thereupon the defendant moved the court to grant him a new trial in this cause, of which motion the court takes time to consider thereof.

And now, at this day, to wit, at a term of said court, held at the place aforesaid, on Friday, the 26th day of March, 1869:

The court, having considered the motion for a new trial in this cause entered at a former term, doth overrule the same. It is therefore considered by the court that the plaintiff Uriah Thompson recover of the defendant the possession of the land and premises, according to
42 the verdict of the jury, as found and recorded at a former term of this court, and his costs by him about his suit in this behalf expended, and the said plaintiff may have execution therefor against the defendant. Whereupon the plaintiff Uriah Thompson prays a writ to the marshal to be directed to cause him have possession of the land and premises aforesaid, according to the verdict, and to him it is granted; and that the defendant, as to other plaintiffs other than said Thompson, go thereof without day.

MEMO.—Be it remembered that, upon the trial of this cause, the defendant, by his counsel, tendered several bills of exceptions to the rulings of the court, numbered, respectively, No. 1, 2, 3, 4, 5, & 6, which are signed and sealed by the court, and ordered to be made a part of the record of this cause. And the court here certifies that the land in dispute in this cause exceeds the value of two thousand dollars.

Affidavit.

The affidavit filed by the defendants, & heretofore referred to, is as follows:

WESTERN JUDICIAL DISTRICT OF VIRGINIA,
County of Harrison, to wit:

43 Charles Schutte and L. P. Bonnell, defendants in an action of ejectment at the suit of Uriah Thompson and others against them, pending in the district court of the United States for the western district of Virginia, at Wheeling, this day came before me, John W. Boggess, a notary public in and for the county of Harrison, in the district aforesaid, and made oath that they have good reason to believe, and do believe, that if the land in the declaration and in the said action can be located at all, the same was from the emination of the grant therefor to the formation of the county of Doddridge, situated in the county of Harrison, and has been, since the last-mentioned time, in the county of Doddridge, and that the place of residence of each of the said affiants, at the time of the service of the said declaration, and ever since, has been in that part of the said county of Dodddrige which, previous to the formation thereof, was part of the said county of Harrison; that the said land is about 100 miles from Wheeling, and about 20 miles from Clarksburg; that the said affiants have good reason to believe, and do believe, that said action was brought without the privity
44 or consent or authority of either Chapman Biddle, or Mary L. C. Biddle, his wife, or Walter L. Cochran, or John Cochran, or Ellen Walter, or William Kenneys, or Catharine Kenneys, or Gerrett Smith, Cornelia S. Barclay, or Gerrett H. Smith, or James W. Cochran, or A. Baird, or Cornelia W. Smith, his wife; that the said affiants were ignorant of the want of such privity or consent or authority until within the last week.

Given under my hand this 10 day of April, 1860.

J. W. BOGGESS, *N. P.*

Bill of exceptions marked No. 1 is as follows:

THOMPSON
vs.
SCHUETTE, &C.

Be it remembered that, upon the trial of this cause, the plaintffs, in support of the issue joined upon their part, offered to read in evidence the deposition of William Underwood, taken in this cause, with the certificate thereto annexed touching the time, place, and manner of taking the same; which said deposition and certificate are in the words and figures following, to wit:

URIAH THOMPSON & OTHERS
vs.
CHARLES SHUTTE.

Ejectment in the United States district court for the district of
45 West Virginia, at Clarksburg.

The deposition of William Underwood, taken before me, Harrison H. Henderson, a justice for the township of Tyler, in the State of West Virginia, pursuant to the notice hereunto annexed, on the 4th day of August, 1864, at the house of said Underwood, in the county aforesaid, to be read as evidence in behalf of the plaintiffs above named on the trial of an action of ejectment pending in the United States district court for the district of West Virginia, wherein Uriah Thompson & others are plaintiffs, and Charles Shuttee is defendant.

Present, Jno. J. Davis, of counsel for the plaintiffs, and Caleb Boggess, of counsel for the defendant.

WILLIAM UNDERWOOD, a witness of lawful age, being first duly sworn, deposeth as follows in answer to interrogatories propounded by the plaintiffs:

Are you acquainted with the land in controversy in this cause? If so, state all you know about it.

Answer. In the fall of 1817 David Curtis, of New York, was sent out by Peter Smith, to see if the Bacon tract—that is, the Jabez Ba-
46 con lands granted by the Commonwealth of Virginia to said Bacon—could be found. We went on the lands, and found three corners and part of two lines, all marked. The land claimed by Jabez Bacon was 20,000 acres, granted by patent of the commonwealth. There were some 21 patents altogether, covering 20,000 acres. In 1818 Curtis came out again to find the lands aforesaid, and Mr. Curtis & I got Mr. Jeremiah Williams, who said he had helped run said land in 1785, to go with us to show the lines. Curtis & I then proceeded to survey the whole 20,000 acres granted to Bacon, and found all the lines and corners according to the calls of the patents, and pretty generally marked. We found the beginning corner on a bank just above a rock, on a run that is called Wolf Run Fork, a branch of Little Flint. We went on in direction north 45 east to a line on a long point, which was well marked; I have seen it often since. We kept the same course until we come to a chestnut oak, on the Broad Run side, near the top of the ridge between Frank's Run and Broad Run, which tree was an ancient, well-marked tree. Then we run south 45 east to a double poplar, on a gradual point running southward in the forks of Frank's Run; poplar

was well marked. We then continued the same course till we
47 come to a large white walnut, on the south side of the middle fork of McElroy Creek, some forty rods from the creek, I suppose; though I will not be certain as to the distance. We continued the course until we got on to the waters of Robinson's Fork—the main fork. The course & distance which called for a white oak was out, and we found a white oak down, upon which we discovered no mark. We continued on the same course, & came to a maple, well marked; continued the same course, crossed McElroy twice, & come to a maple, in sight of the Elkhorn Gap; there we cornered; we stopped at the maple at that time. Some time before the survey or running of which I have been speaking, but in the fall of the year, Curtis, Williams, and myself, (I was pilot & packer,) started at the white oak, the beginning, and run south 45 east to a dogwood, which had been marked, and on which the scars were seen, on a slope on a branch of Morgan's Run. Then we run north 45 east to a beech, on Big Battle, well marked as a corner. These were all the boundaries that Curtis and I run. In the year 1836 Luther Haymond, surveyor, was employed to run the line from the maple at Elkhorn Gap, where Curtis and I left off, and did run it. I was
48 along with him. He started at the maple, run a line across McElroy, and run the distance called for by Bacon's line. He run the line to know how the lines of another tract adjoining it were. The main maple was down, but the pointers were standing, and the mark was on the maple; the maple was standing when I Curtis were there. There were objects marked on the line run by Haymond, but I don't remember what they were. The object Haymond had in running the line was to ascertain the boundaries of the Bacon land. I have seen many of the lines and corners since, but not round the entire tract. Williams said that he had helped make the survey of the Bacon lands for Bacon in 1785, and the lines & corners made by Curtis & I were these which had been marked by Williams. Curtis & I had the 21 patents from the Commonwealth of Virginia to Jabez Bacon with us when we surveyed the land, and the lines we run corresponded with the courses & distances of the patents. In Dec., 1817, I became the agent of Peter Smith, of Peterboro, New York, to pay the taxes on, and see to the management of, the 20,000 acres of land granted to Bacon. I understood that Smith had purchased the lands. I paid the taxes on said lands until
49 Gerrit Smith became the owner of them, which was about the year 1820. Gerrit Smith at that time sent me money to pay up all taxes that were in arrear, which I did, & requested me to continue as his agent. While I was agent for Peter Smith, I paid the taxes on the said lands as they become due, or saw that they were paid; while the lands were Gerrit Smith's, I paid up the taxes. When Gerrit Smith and his brother-in-law disposed of the lands to the Oberlin Institute, the latter wrote to me to continue as their agent, & see to paying up the taxes, which I did. The Oberlin Institute disposed of the lands to the plaintiff Uriah Thompson, which was in 1854. Samuel McMillan then became the agent. From the time I became the agent for said lands in the year 1817, down to year 1854, when I resigned, the taxes were all regularly paid on the said lands. I saw to the payment of the taxes. I have none of the tax receipts. I generally sent them on to the owners of the land, annually, as they were paid, to let them see how I had disposed of the money. I don't remember when I sent them—the last tax receipts. The last tax receipts for taxes paid by me as agent I sent to the Oberlin Institute, or to whomsoever the land was taxed.
50 The Oberlin Institute sold to Frederick Cunningham 10,827½

acres of the land, and they were charged to Cunningham on the books. I paid the taxes for Cunningham, and have the receipts for the taxes, which are here produced, and filed, marked 1 & 2, as part of my deposition. In 1826 I, as the agent for Gerrit Smith, placed as a tenant on said lands Adam Ash. In 1829 Elias Williams went on as tenant. Thomas Williams went on in 1833 as tenant. Gideon Roberts went on in 1834 as tenant. Edward Thomas, as tenant, went on the land in 1835. Isaac Weekly went on as tenant in 1836; & Eli Piles went on as tenant, but the year which he did so I have forgotten. Lawyer Fitzhugh, who was the brother-in-law of Gerrit Smith, and myself were at Adam Ash's some time shortly after he went on the lands, and Fitzhugh advised me to charge the tenants something, in order to pay the taxes. Adam Ash is dead. His wife and family are still living on the land I placed him in possession of. Elias Williams lived on the land I put him in possession of until McMillan purchased that part of it. The same of Thomas Williams. Gideon Roberts lived on the land I placed him in possession of until I removed him and placed John Ash on the land. Ash has since become the owner of the land by purchase
51 from McMillan, as I understand. Edward Thomas died several years after he took possession of the land. Clute became the purchaser of it about the time Thon as died, or before, & afterwards sold to McMillan. James Weekly is still on the land. There has been some one on the land ever since 1826, as tenants, first of Gerrit Smith, then the Oberlin Institute, and down to the present owner of the land. These several tenants were all in possession of parts and parcels of the lands embraced in the several patents to Jabez Bacon. The several tenants spoken of made improvements on the land, built cabins and out-houses, or whatever necessary buildings they wanted; they also cleared land and fenced it, but how much, or to what extent, I cannot say. There were no defined or limited boundaries to their possession. They were to go on the land, and make such improvements as suited them, free of rent for two years, and then after that time they were to pay two dollars a year, but there was no specified time agreed upon for them to stay. The only restriction placed upon their possession or use of said land was that they were not to destroy timber unnecessarily. The object in placing tenants on the land was to preserve or maintain possession of the premises, and the object was made known to
52 them. There was no limited or defined boundary to the leases of the several tenants before named; they were to have little or much of the lands, just as they pleased. The plat marked "A," filed herewith, is a correct plat of the boundaries of the Bacon land, as surveyed by David Curtis and myself in 1818, as far as we went.

Cross-examined:

Question by defendant. How many of the corner trees of the tracts of said land have you seen since 1818?

Answer. I have seen seven of them, as follows: the white oak, the beginning; the lynn; the chestnut oak; the double poplar; the white walnut, which had been cut down; the maple, the maple in sight of Elk Horn Gap; beech on Battle Run bank, on the south side; the beech on East Run; the dogwood on Mayan's Run.

Question by same. What is the latest period at which you have seen these trees?

Answer. I saw several of them since, in 1854; I then saw the lynn, chestnut oak, double poplar, white walnut stump.

Question by same. Who besides yourself was along in 1818 with
53 Curtis & Williams, when the surveying was done?

Answer. No one was along with us on the outlines; no chain was carried on them.

Question by same. Will you state to which of several tracts the above-named trees were marked as corners?

Ans. I cannot tell to which tracts they were corners, except the beginning.

Question by same. Which of the seven corner trees above named were found by you & Curtis on the line N. 45 east from the beginning?

Answer. 1st a W. O., then a lynn, then a chestnut oak.

Question by same. Which of the seven corner trees were found on the course marked on the plat referred to by you, from the chestnut oak S. 45 E.?

Ans. Double poplar, maple in left of gap.

Question by same. Which of said corner trees did you find on the outside eastern line of the surveys?

54 Ans. None of them.

Question by same. Do you know, or did you ever hear, of any other than the said 2,000 acres of land being owned or claimed by the said Peter Smith or Gerrit Smith, in Tyler County or Harrison County?

Ans. I have never known or heard of either of them claiming any other land than the said 21 tracts of land of 20,000 acres patented to Jabez Bacon.

Question by same. Will you please state for what years you paid the taxes on said land?

Ans. I paid the taxes on the said land from 1817 to 1854, both years included.

Question by same. Did you pay said taxes each year, or did you suffer it to become delinquent for any one, and pay the taxes for such delinquent years afterwards?

Ans. I paid for each year, and did not let it become delinquent. It was returned delinquent by the sheriff of Tyler County for one or more years between, I think, 1840 & 1845, although the taxes had been paid to him, and afterwards, on the day of sale, I redeemed it.

55 Question by same. To whom did you pay the tax for said land from 1817 to 1854?

Ans. To the sheriff of Tyler County.

Question by same. Did you pay any taxes for said land which had been charged prior to 1817; if so, to whom did you pay it?

Ans. Garret Smith sent me money to pay any back taxes that might be charged for said land. I wrote to some member or members of the legislature to ascertain whether there was any such arrearage of taxes due upon said land, and to pay them at Richmond, and that I would refund the am't, and do not now remember whether there was any such or whether any such was paid, but think if there had been any such, they were paid. I did pay the money that Smith had sent me to some one not now remembered, and in some way relating to his land.

56 Question by same. You will please state which of the several tracts of 20,000 acres was occupied at any time by the persons you have named as tenants placed on the land by you?

Ans. I cannot tell on which of the several tracts the possession was taken by said tenants.

Question by same. Do you now, or did you ever, own any part of said 20,000 acres of land patented to Jabez Bacon?

Ans. I do not now, nor never did.

Question by same. Did you at any time ever sell any part of said land as agent?

Answer. I did not.

Re-examined by the plaintiff:

I don't think that all the marked trees of the Bacon survey are laid down on the plat made by David Curtis in 1818, heretofore referred to. Adam Ash, one of the tenants spoken of, was placed on the land near East Run, in the southeastern part of the 20,000 acres. Elias Wilson was placed on the Flint Run, about two miles from Ash. Thomas
57 Williams lived between the two. Gideon Roberts and James Weekly lived on Rigen's Run.

And further this deponent saith not.

W. UNDERWOOD.

I hereby certify that the foregoing deposition was taken, subscribed, and sworn to before me at the time and place mentioned in the caption thereof. I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of said suit.

Given under my hand this 14th day of August, 1864.

H. H. HARDMAN, *Justice.*

To the reading of which said deposition the defendants objected, because the same was not taken and certified by an officer authorized by the acts of Congress to take and certify a deposition so as to be evidence in this court; also because the said deposition was taken without any affidavit of the cause or reasons for taking the same,
58 and without any commission having been issued to authorize the taking of the same; also because it is not certified or proven that the witness was sworn to testify to the whole truth, and for other defects and omissions apparent on the face of said deposition and certificate. It appearing that said deposition was filed in the papers of said cause more than one year before the trial thereof, & no exceptions taken or endorsed thereon; that witness was an aged man when his deposition was taken, & had died before the trial, and no exceptions, verbal or otherwise, were taken until the deposition was offered in evidence by the pl'ffs; and it further appearing that one of the counsel of def'd't had accepted notice for taking said deposition, & had appeared at the taking thereof, and cross-examined the witness, as shewn by the deposition; the court taking judicial cognizance of the acts of assembly of West Virginia, from which it appears that a justice is required by law to keep a record of all his proceedings, and his power to im-
59 pannel a jury to try causes before him, and that appeals will lie from his decisions, upon which transcripts of his record are evidence in the court, is for these reasons that he is a judge of a court within the meaning of this act of Congress relative to the taking of depositions de bene esse, but the court overruled the said objection, and permitted the said deposition to be read in evidence to the jury. And to the opinion of the court overruling the said objection and permitting the said deposition to be read in evidence to the jury, the defendant, by his attorney, excepted, and prays that this his bill of exception may be signed, sealed, and made a part of the record; which is done accordingly.

And the defendant objected to the reading of the following parts of

the said depostion, or any parts thereof, as evidence to prove that Smith or the Oberlin Collegiate Institute had title to the land therein mentioned: "I understood that Smith had purchased the land;" "Gerrit Smith became the owner of them;" "While the lands were
60 Gerrit Smith's;" "When Gerrit Smith and his brother-in-law disposed of the land to the Oberlin Institute."

And the court sustained the said objection, and allowed the said parts of the said deposition to be read, not to prove that either of the said persons owned the said land, but for any other proper & legal purpose.

JOHN J. JACKSON, JR. [SEAL.]

PLAT "A."

Referred to in the foregoing deposition of William Underwood, and filed with the same, is hereto attached.

(Here follows map marked page 60.)

61 The tax receipts referred to and filed with the deposition of William Underwood, marked "1 & 2," are in the words and figures following, to wit:

"FREDERICK CUNNINGHAM
"TO THE SHE'FF OF DODDRIDGE CO., DR.
"1853. To tax on 10,827½ acres land, $10 83+7 04=$17 87.
"Rec'd payment by W. Underwood, esqr.
"Nov'r 28th, 1853.
(Signed) "FLOYD NEELY, *S. D. C.*"

"FRED'K CUNNINGHAM
"TO THE SHE'FF OF DODDRIDGE CO., DR.
"1854. To tax on 10,827½ acres of land, &c., $10 83.
"Rec'd payment by W. Underwood.
(Signed) "FLOYD NEELY, *S. D. C.*"

62 Bill of exceptions No. 2 is as follows:

THOMPSON, &C., *vs.* SCHUTTE. } No. 2.

Be it remembered that, upon the trial of this cause, after the plaintiff had read in evidence to the jury certain grants from the Commonwealth of Virginia to Jabez Bacon, twenty in number, seventeen of which contain each 1,000 acres, two of which contain 922 acres each, and one containing 156 acres, all bearing date in the month of October, 1797, and lie adjoining each other in the way and manner as laid down on the plat and report of Surveyor Sherwood, referred to in bill of exceptions No. 4, which said grants the plaintiff claimed, covered and embraced the land in controversy in this cause; and after he had given evidence tending to show that the land in controversy was embraced within the boundaries of said grants; and after the plaintiffs had read in evidence that part of the deposition of Nathaniel A. Bacon which was admitted, which is in the words and figures following:

Deposition of Nathaniel A. Bacon, in the county of New Haven, in the State of Connecticut, taken on the part of the plaintiffs before me, Morris Tyler, mayor of the city of New Haven, in the State of Connecticut, at the mayor's office in said city, on this 28th day of October, A. D. 1864, New Haven, Connecticut, in a certain cause and action of ejectment now pending in the United States district court for the district of West Virginia, wherein Uriah Thompson, a citizen and resident of the State of Ohio; The Oberlin College, a body politic and corporate, created by the legislature of the State of Ohio, residing and doing business in the said State, and exercising its corporate powers, franchises, and privileges therein, and a citizen thereof; and Chapman Biddle, and Mary L. C. Biddle, his wife, citizens and residents of the State of Pennsylvania; and Walter L. Cochran, John Cochran, Ellen Walter, William Kenneys, Catharine Kenneys, his wife, Gerrit Smith, Cornelia L. Barclay, and Gerrit H. Smith, all citizens and residents of the State of New York; and James W. Cochran, of the State of Illinois, a citizen and resident thereof; and A. Baird, and Cornelia W. Smith, his wife, citizens of the State of Louisiana, are respectively lessors of plaintiffs; and Charles Shutte, a citizen and resident of Doddridge County, in West Virginia, is
63 defendant, and to be used in evidence in said cause and action of ejectment.

NATHANIEL A. BACON, a resident of New Haven, in the State of Connecticut, being by me first duly examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the aforesaid cause and action, deposes and says, in answer to the several enquiries by the plaintiffs' agent, F. D. Parish, esq., as follows:

I am a resident of the city of New Haven, State of Connecticut; born in Woodbery, in same State, in 1798, wherein I resided until the year 1855; am the son of the late Nathaniel Bacon, formerly of said Woodbury, and a grandson of Jabez Bacon, late of Woodbury, who died in 1806; my father died in 1849. To the best of my recollection, it was understood in the family that my grandfather had been the owner of a large tract of land in Virginia.

Garry Bacon was a son of said Jabez Bacon, and died in 1821.
65 John Bacon was the grandson of said Jabez Bacon, and son of Jabez Bacon, jr., and died in 1807, and was for several years previous the clerk and accountant of said Jabez Bacon, and a member of said Jabez's family.

NATH'L A. BACON.

And the plaintiffs had read the deposition of Hamilton Hill, subject to the qualification that the defendant had objected to the reading of the following, or any other parts thereof, as evidence to prove the contents or execution of any deeds or deed, or that any land had been conveyed to the Oberlin Collegiate Institute or the Oberlin College, "conveying to said college," "which said land was ultimately conveyed by Gerrit Smith to said college,"—and the court sustained the said objection; but admitted the said deposition, not to prove the contents or execution of such deeds, or that they conveyed the lands mentioned, but for any other proper and legal purpose; and the deposition of George N. Allen; which said depositions are in the words and figures following:

66 Deposition of Hamilton Hill, a resident of the city of Cleveland, and Cuyahogo County, in the State of Ohio, taken before Stevenson Burke, one of the judges of the court of common pleas and district court of the fourth judicial district of the State of Ohio, at his office, in the county of Lorain aforesaid, on the 11th day of January, 1865.

Said HAMILTON HILL, being first duly sworn, deposes as follows:

1 question by the plaintiffs. State your age and residence.

Answer. I am seventy years old, and reside in the city of Cleveland at present.

2d by same. State whether you have heretofore been connected with the Oberlin College; and, if so, in what capacity, and during what period of time.

Answer. I have, as secretary and treasurer, for twenty-four years, from the year A. D. 1840 to A. D. 1864.

67 3rd by the same. What officer of said college has during said period had the care and custody of the papers belonging to said college, including the title deeds of its real estate?

Answer. The secretary and treasurer.

4th by the same. State whether at any time, as such secretary & treasurer, you had in your possession and control any deed or deeds of real estate, situated in West Virginia, conveyed by Gerrit Smith to said college; if so, state for what particular tracts or parcels of land, and the date of said deed or deeds.

Answer. I had in my possession, as such secretary and treasurer, certain deeds and patents of real estate in the State of Virginia, now West Virginia, conveying to said college twenty thousand acres of land, situated in Doddridge County, West Virginia, consisting of about twenty or twenty-one patents from the State of Virginia to Jabez Bacon,

68 and of several intermediate deeds, by which said land was ultimately conveyed by Gerrit Smith to said college, and consisted of deeds by several men by the name of Bacon and Philo Murray and Peter Smith and Daniel Cady. I recollect there was a deed from Peter Smith to Gerrit Smith and Daniel Cady to Gerrit Smith, and a deed of the whole tract from Gerrit Smith to said college.

5th by the same. State how often you had occasion to look at said deeds, and what the appearance of said deeds was.

Answer. I saw the deeds occasionally. There was nothing unusual in their appearance. They had the appearance of bona-fide deeds.

6th by the same. While said deeds were in your possession, did you ever know or hear the genuineness of said deeds questioned?

Answer. I never did.

7th by the same. State whether you now have said deeds in your

69 possession, or know where they are. Please give all the information you can respecting them.

Answer. I have not said deeds or patents, or any of them, in my possession. I do not know where any of them are. The last I knew of the deeds they were sent to George Whiffle, as the agent of the college at New York, for the purpose of enabling him, as agent for the college, to effect a sale of a part of said land to Frederick Cunningham. He effected the sale to Cunningham, and the deeds were thereupon handed over to Cunningham, as I suppose, and as I understood. Cunningham, at the time of his purchase, executed a mortgage to the college for part of the purchase-money, but, failing to make payment, the mortgage was foreclosed and the land bid in by the college, but the original deeds were

not returned to my possession. The sale to Cunningham was made about A. D. 1842; perhaps later. I think the deeds never came
70 back into my possession. I have corresponded with said Whiffle in respect to them, and since the present litigation commenced in respect to said lands, & have made diligent and thorough search for said deeds in the office of said college, and wherever there would be any probability of finding them, and found none of them.

And further saith not.

HAMILTON HILL.

The deposition of George N. Allen, taken before the said Stevenson Burke at the time and place mentioned last aforesaid.

Said GEORGE N. ALLEN, being first duly sworn, deposes as follows:

1 question by the same. State your age, occupation, and residence.

Answer. My age is fifty-two; I am at present secretary and treasurer of the Oberlin College, and have been since August, A. D. 1864; I reside at Oberlin, Lorain County, Ohio.

2d by the same. State whether you have made search for certain deeds & papers mentioned in the deposition of the witness Hamilton Hill.

71 Answer. I have made a thorough search for such deeds and papers, and found none. They are not in the office, and I am unable to say where they are.

And further saith not.

GEO. N. ALLEN.

And the plaintiffs had given evidence tending to prove that Jabez Bacon had as many as eight children, of whom Nathaniel Bacon was one, and died in the year 1806; that his heirs were numerous; that since the institution of this suit a witness had conversed with several of them, and they did not claim the land aforesaid. The said plaintiffs, in further support of the issue joined upon their part, offered to read to the jury a paper writing, purporting to be a certified copy of a deed from one Nathaniel Bacon to one Philo Murray, dated 3 May, 1815, with the certificates thereto annexed; which said copy of said deed and certificates is in the words and figures following, to wit, (the deed here referred to is in the words and figures following:)

72 *Nathaniel Bacon to Philo Murray.*

Deed for 20,000 acres on waters of M. I. Creek.

To all people to whom these presents shall come, greeting:

Know ye that I, Nathaniel Bacon, of New Haven, in New Haven County, & State of Connecticut, in consideration of four thousand dollars received, to my full satisfaction, of Philo Murray, of Woodbury, in Litchfield County, & said State of Connecticut, do remise, release, & forever quitclaim unto the said Philo Murray, and unto his heirs and assigns forever, all the right, title, interest, claim, and demand whatsoever, as I, the said releaser, have, or ought to have, in or to twenty thousand acres of land situate, lying, and being on the waters of Middle Island Creek, in the county of Ohio, & State of Virginia, as described in twenty-one patents from the State of Virginia to Jabez Bacon, one of which patents, dated 23d of October, 1787, twelve of which patents, dated 29th October, 1787, and the other eight patents, dated 30th Oct'r,

1787; which patents or grants are herewith handed over to said Philo Murray; and the above lands sold, subject to all settlement which may be upon any part of the lands, if any there be; and the said Nathaniel Bacon hereby agrees to pay all the taxes on the aforesaid lands which fall due previous to the 1st January, 1814, if any there is, which was unpaid at that time: To have and to hold the premises, with all
73 their appurtenances, unto the said releasee, and his heirs and assigns forever, so that neither I, the releaser, nor any heirs, nor any other person under me or them, shall hereafter have any claim, right, or title in or to the premises, or any part thereof, but therefrom I and they are forever barred and secluded.

In witness whereof I have hereunto set my hand & seal the 3d day of May, A. D. 1815.

NATHANIEL BACON. [SEAL.]

Signed, sealed, & delivered in presence of—
JONATHAN INGERSOLL.
HARRIET INGERSOLL.
MATTHEW MINOR, Jun'r.

NEW HAVEN COUNTY, *ss:*

NEW HAVEN, *May 3d*, 1815.

Personally appeared Nathaniel Bacon, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed before me.

JONATHAN INGERSOLL,
A Judge of the Superior Court in & for the State of Connecticut.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

At a district court of the United States, held at New Haven, within & for said district, on the 4th Tuesday of February, A. D. 1817—
74 present, the Hon'ble Pierpont Edwards, judge—personally appeared Nathaniel Bacon, signer & sealer of the within instrument, and acknowledged the same to be his free act and deed.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at New Haven, the 26th day of February, A. D. 1817.

[SEAL.] H. W. EDWARDS, *Clerk.*

I, Peirpont Edwards, judge of said court, hereby certify that said H. W. Edwards is clerk of said court.

In witness whereof I have hereunto set my hand the day above written.

Examined.

PEIRPONT EDWARDS,
Dist. Judge.

Tyler County court, April, 1817, the foregoing deed from Nathaniel Bacon to Philip Murray was presented in court & ordered to be recorded, together with this certificate annexed.

A copy. Teste:

A. S. BIRCKHEAD,
C. T. C. C.

STATE OF WEST VIRGINIA,
County of Tyler, ss:

I, Ellis T. Nicklin, recorder of the county aforesaid, do certify that

the foregoing is a true copy from the records of deeds transferred
75 to the recorders of Tyler County, State of West Virginia,
by an act of the legislature passed June 26th, 1863.
Given under my hand this 10th day of March, A. D. 1865.

E. T. NICKLIN.

[Inter. rev., 5 cts., E. T. N., Mar. 10, '65.]

To the reading of which said copy in evidence on the trial of this issue the defendant, by his attorney, objected; but the court overruled the said objection, and permitted the said copy to be read as evidence to the jury. And to the opinion and ruling of the court to that effect the defendant, by his attorney, excepted, and prayed that his said exception might be signed, sealed, and made a part of the record; which is done accordingly.

JOHN J. JACKSON, JR. [SEAL.]

Bill of exceptions marked No. 3 is as follows:

THOMPSON, &C., *vs.* SCHUETTE. } No. 3.

Be it remembered that upon the trial of this cause the plaintiffs, after they had given evidence, as set out in bills of exceptions No. 1 & No. 2, and had read the copy of the deed therein mentioned from
76 Nathaniel Bacon to Philo Murray, offered, in further support of the issue joined upon their part, to read in evidence to the jury a paper writing, purporting to be a copy of a deed from Philo Murray to Peter Smith, dated on the 22d day of April, 1815, and of the certificate of acknowledgment thereof; which said copy is in the words and figures following, to wit:

Philo Murray to Peter Smith.

Deed for 20,000 acres of land on waters of M. I. C.

This indenture, made the 22nd day of April, in the year of our Lord 1815, between Philo Murray, of Woodbury, State of Connecticut, of the first part, and Peter Smith, of Smithfield, State of New York, of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of eight thousand dollars, money of account of the United States to him in hand paid at and before the ensealing and delivery of these presents by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, and sold, aliened, remised, released, conveyed, assured, enfeoffed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, assure, enfeoff, and confirm, fully, freely, and absolutely, unto the said party of the second part, in his actual possession now being, and to his heirs and assigns forever,
77 all those twenty thousand acres of land lying in one body on the waters of Middle Island, in the now or late county of Ohio, and State of Virginia, (which lands are supposed now to be included within the bounds of the county of Tyler,) and the said land is more particularly described in twenty-one several general grants from the Commonwealth of Virginia, made to Jabez Bacon—one of which aforesaid grants is dated on the 23d day of October, twelve of the said grants

are dated on the 29th day of the same month, and eight of said grants are dated on the 30th day of the same month, and all within the year 1787—reference being had to the said grants or deeds, which are herewith delivered to the said party of the second part, a more full description of boundaries, &c., will be seen, which said lands are nevertheless subject to, and encumbered with, three settlement rights, so called, containing together not to exceed three hundred acres at the most, and also subject to all taxes levied or imposed subsequent to the first day of January, 1814, together with all and singular the appurtenances, privileges, and advantages whatsoever unto the above mentioned and described premises in any wise appertaining or belonging; and the reversion & reversions, remainder & remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property,
78 claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, or any part or parcel thereof, with the appurtenances: To have and to hold the above granted, bargained, & described premises, with the appurtenances, unto the said party of the second part, his heirs & assigns, for their own proper use, benefit, & behoof forever. And the said party of the first part, for himself & his heirs, doth covenant, promise, grant, & agree, to & with the said party of the second part, his heirs & assigns, that he, the said party of the first part, at the time of ensealing & delivery of these presents, is lawfully seized in his own right of, in, & to the aforesaid described premises hereby granted and conveyed, with the appurtenances, as of a good, sure, perfect, absolute, & indefeasible estate of inheritance in *in* fee-simple, without any manner of condition to alter, charge, determine, or defeat the same; and hath in himself good right, full power, and lawful authority to grant, bargain, sell, convey, & release the above said described land, with the appurtenances, unto the said party of the second part, his heirs & assigns, in manner aforesaid; and also that he, the said party of the second part, his heirs & assigns, shall & may from time to time, & at all times & forever hereafter, peaceably & quietly have, hold, occupy, possess, & enjoy the said hereby
79 granted & bargained premises, with the appurtenances; and also that the said party of the first part, & his heirs, & all other person or persons whomsoever lawfully or equitably deriving any estate, right, title, dower, jointure, or interest of, in, or to the hereinbefore-granted premises by, from, under, or in trust for him & them, shall & will at any time or times hereafter, upon reasonable request of the said party of the second part, his heirs or assigns, & at the proper costs & charges in the law of the said party of the first part, his heirs or assigns, make, do, & execute, or cause or procure to be made, done, & executed, all & every such further & other lawful & reasonable conveyances & assurances in the law for the better & more effectually vesting & confirming the premises hereby intended to be granted in & to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably desired, advised, or required. And the said party of the first part, for himself & his heirs, covenant & agree to & with the said party of the second part, his heirs & assigns, to warrant, and by these presents forever to defend, the above described & released premises, & every part & parcel thereof, to the said
80 party of the second part, his heirs & assigns, against the said party of the first part, his heirs & assigns, & against all other persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

In witness whereof the said party of the first part hath hereunto set his hand & seal the day & year first above written.

PHILO MURRAY. [SEAL.]

Signed, sealed, & delivered in the presence of—NOTE.—In the 6th line from bottom the word "first" was written on erazure—

ROBERT FAIRCHILD.
HEZ. HUNTINGTON.
SETH TURNER, Jun'r.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

At a district court of the United States, held at New Haven, within and for said district, on the fourth Tuesday in February, A. D. 1817—present, Honb. Pierpont Edwards, district judge—personally appeared Philo Murray, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed.

In witness whereof I have hereunto set my hand & affixed the
81 seal of said court, at said New Haven, this 27th day of February, A. D. 1817.

[SEAL.] H. W. EDWARDS, *Clerk.*

I, Pierpont Edward, judge of said court, do hereby certify that said H. W. Edwards is clerk of said court.

Witnessed by my hand the day above written.

PIERPONT EDWARDS, *Dist. Judge.*

Tyler County court, October term, 1817, this deed was presented in court, and ordered to be recorded, together with the certificate annexed.

A copy. Teste:

A. S. BIRKHEAD, *C. T. C. C.*

STATE OF WEST VIRGINIA,
County of Tyler, ss:

I, Ellis T. Nicklin, recorder of the county aforesaid, do certify that the foregoing is a true copy from the records of deeds transferred from the clerk's office of Tyler County, Virginia, to the recorder's office of Tyler County, West Virginia, under & by virtue of an act of the legisture of said State of West Virginia passed June 26th, 1863.

Given under my hand this 10th day of March, 1865.

E. T. NICKLIN.

[Inter. rev., 5 cts., E. T. N., Mar. 10th, '65.]

To the reading of said paper writing the defendant, by his attorney, objected; but the court overruled his objection, and permitted the same to be read as evidence to the jury. And to the opinion and ruling of the court to that effect the defendant, by his attorney, excepted, and prayed that his exception might be signed, sealed, and made part of the record; which is done accordingly.

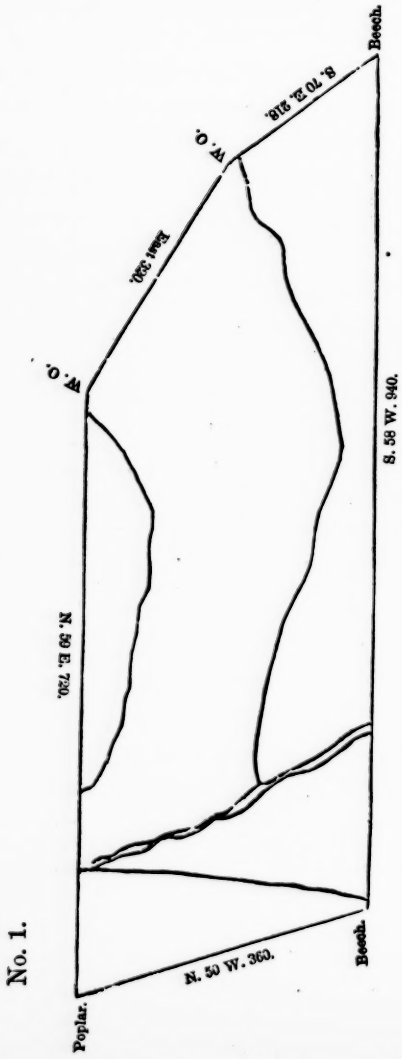
JOHN J. JACKSON, JR. [SEAL.]

82 Bill of exceptions marked No. 4 is as follows:

THOMPSON, &C.,
vs.
SCHUETTE. } No. 4.

Be it remembered that, upon the trial of this cause, after the plaintiffs

had given evidence to the jury, as stated in bill of exceptions No. 1, No. 2, and No. 3, and had also given in evidence the plat and report of survey made by Daniel Sherwood, under the order of the court in
83 this cause, in the words and figures following, to wit, and had concluded the evidence in support of the issue on their part, the defendant, in support of the issue joined on his part, gave in evidence to the jury a copy of a survey made for Thomas Laidley, in these words:



No. 1.

JANUARY 10TH, 1785.

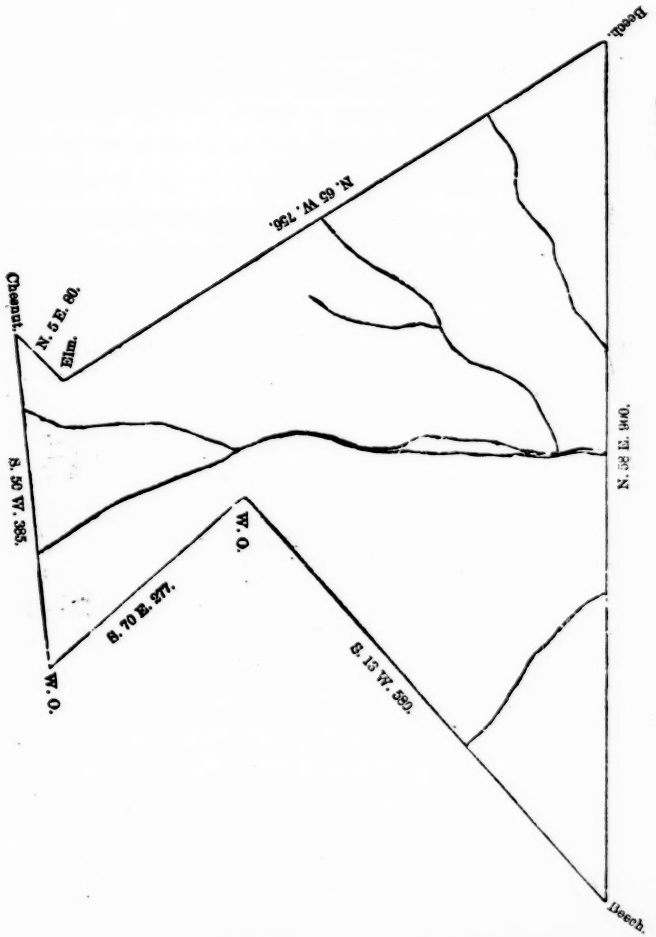
Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land, in Harrison County, on a land office treasury warrant, No. 21775, dated 24th December, 1783, in the forks of Ten Mile Creek, adjoining on the north side of lands claimed by Hezekiah Davisson, bounded as followeth, viz: Beginning at a white oak, near a drain, and running east 320 poles to a white oak; north 59° east 720 poles to a poplar; north 50° west 360 poles to a beech; south 58 W. 940 poles
84 to a beech; south 70° east 218 poles to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond,
S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
THO. HAYMOND,
S. H. C.
25TH AUG'T, 1853.

Also a copy of survey for said Laidley, in these words:



JANUARY, 10TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of
85 David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21774, dated the 1st December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a southwest corner of survey No. 1, at a beech, and running thence north 58° east 900 poles to a beech, corner of said survey; north 65° west 756 to an elm; north 5° east 80 poles to a chesnut; south 50° west 385 to a white oak; south 70° east 277 to a white oak; S. 13° W. 580 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

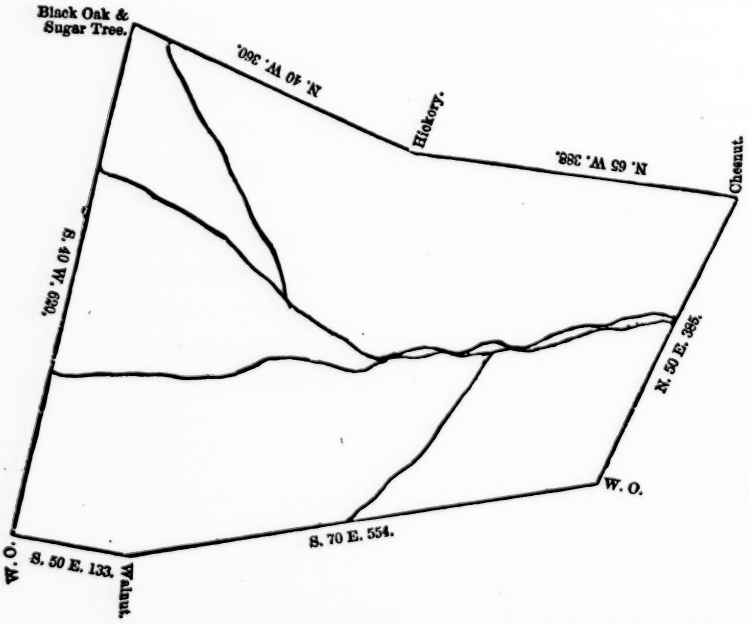
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

Also a copy of the survey for said Laidley, in these words:

86 No. 3.



JANUARY 10TH, 1785.

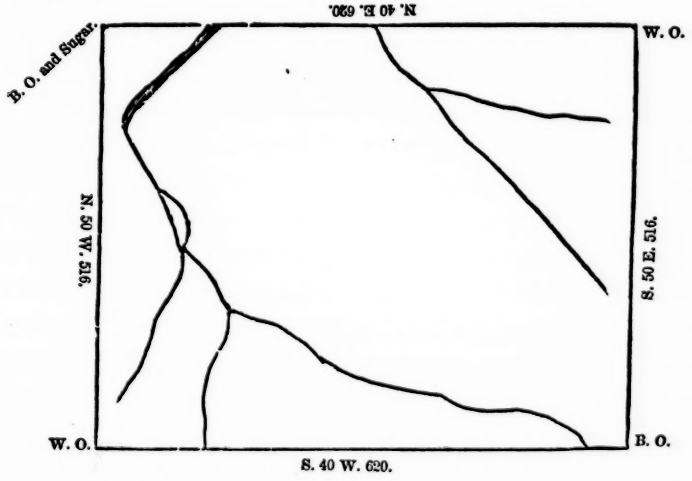
Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of Daniel Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 20918, dated 1st Decem'r, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a chesnut tree, the northeast corner of survey No. 2; and running thence N. 65° W. 388 to hickory; N. 40 W. 360 to a black oak and sugar; S. 40° W. 620 to a white oak; S. 50° E. 133 to black walnut; S. 70° E. 554 to white oak; N. 50 E. 385 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

87 Also a copy of survey for said Laidley, in these words:

No. 4.



JANUARY 12TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21783, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a white oak, southwest corner to survey No. 3, N. 40° E. 620 pole, with a line of said survey, to black oak and sugar; N. 50 W. 516 poles to white oak; S. 40° W. 620 poles to black oak; S. 50° east 516 to the beginning.

HEZEKIAH DAVISSON,
Ass't to Wm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

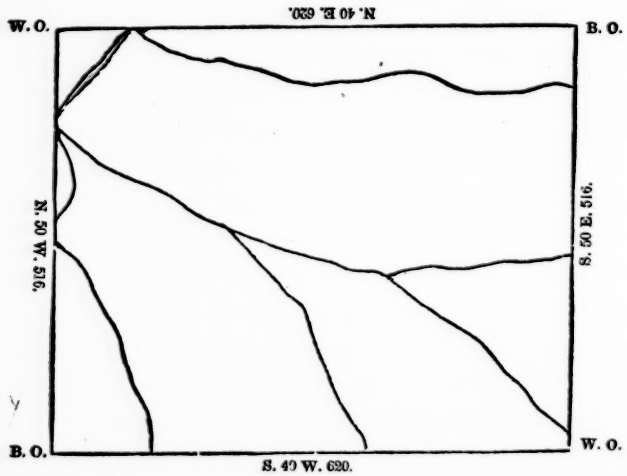
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

88 Also a copy of survey for said Laidley, in these words:

No. 5.



JANUARY 12TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 20921, dated 1st Decem'r, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a black oak, west corner to survey No. 4, and running thence N. 40° E. 620, along a line of said survey, to white oak; N. 50 W. 516 poles to black oak; S. 40° W. 620 poles to white oak; S. 50 E. 516 poles to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

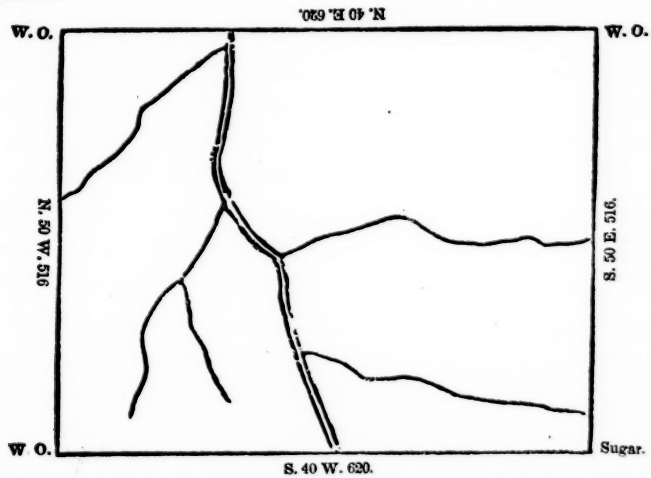
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

89 Also a copy of survey for said Laidley, in these words:

No. 6.



JANUARY 12TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21758, dated 24th Decem'r, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a white oak, west corner to survey No. 5, and running N. 40° east 620 poles, along a line of said survey, to white oak; N. 50 W. 516 to white oak; S. 40° W. 620 poles to a sugar tree; S. 50° E. 516 poles to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.

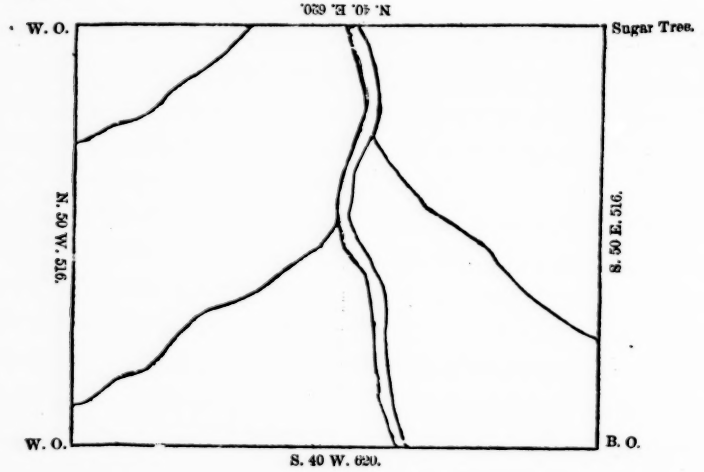
THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

REC. 453—3

90 Also a copy of survey for said Laidley, in these words:

No. 7.



JANUARY 13TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21784, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a sugar tree, west corner to survey No. 6, and running thence N. 40° E. 620, with said line, to a white oak; N. 50 W. 516 poles to white oak; S. 40 W. 620 to black oak; S. 50 E. 516 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

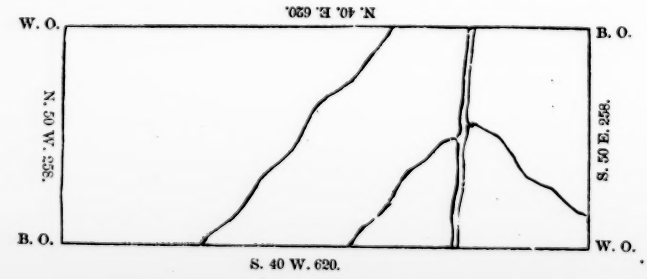
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

91 Also a copy of survey for said Laidley, in these words:

No. 8.



JANUARY, 14TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee David Anderson, 1,000 acres of land in Harrison County, on part of a land office treasury warrant of 2,000 acres, No. 21778, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a black oak, west corner to survey No. 7, and running thence north 40° east 620, along a line of said survey, to white oak; north 50° west 258 to black oak; south 40° west 620 poles to white oak; south 50° east 258 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

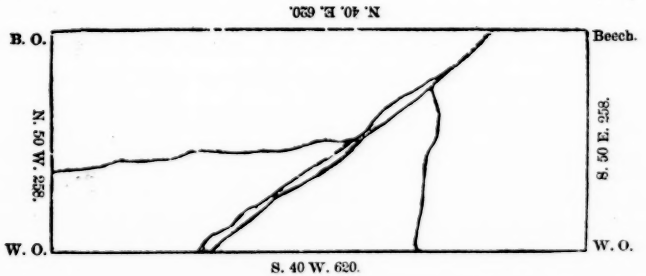
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUG'T, 1853.

92 Also a copy of survey for said Laidley, in these words:

No. 9.



JANUARY 15TH, 1785.

Surveyed for Thomas Laidley, ass'ee Henry Banks, ass'ee of David Anderson, 1,000 acres of land in Harrison County, on part of a land office treasury warrant of 2,000 acres, No. 21778, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at the west corner of survey No. 8, at a white oak, and running thence S. 40 W. 620 poles to white oak; S. 50 E. 258 to a beech; N. 40° E. 620 to black oak; N. 50° W. 258, along a line of said survey, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

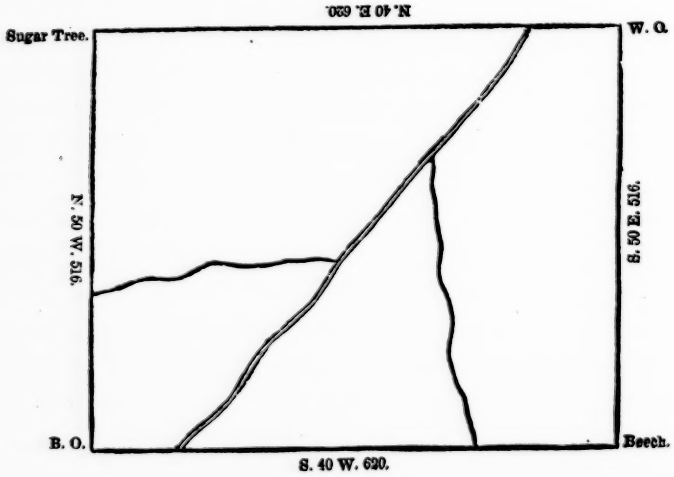
A copy of the record.

THO. HAYMOND, *S. H. C*

25th AUGUST, 1853.

93 Also a copy of survey for said Laidley, in these words:

No. 10.



JANUARY 25TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21810, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a black oak, east corner of survey No. 9, an running thence S. 40 W. 620 poles, along a line of said survey, to beech; S. 50 E. 516 to white oak; N. 40° W. 620 to sugar tree, south corner of No. 7; N. 50° W. 516 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to and inch.

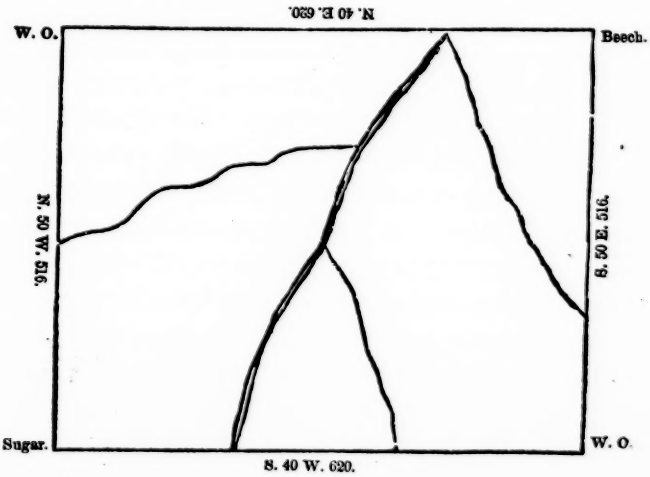
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

94 Also a copy of survey for said Laidley, in these words:

No. 11.



JANUARY 24TH, 1785,

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21802, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a sugar tree, east corner to survey No. 10, and running thence S. 40 W. 620 poles along a line of said survey, to white oak; S. 50 E. 516 to beech; N. 40° E 620 to white oak, corner to No. 6; N. 50 W. 516 pole to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch.

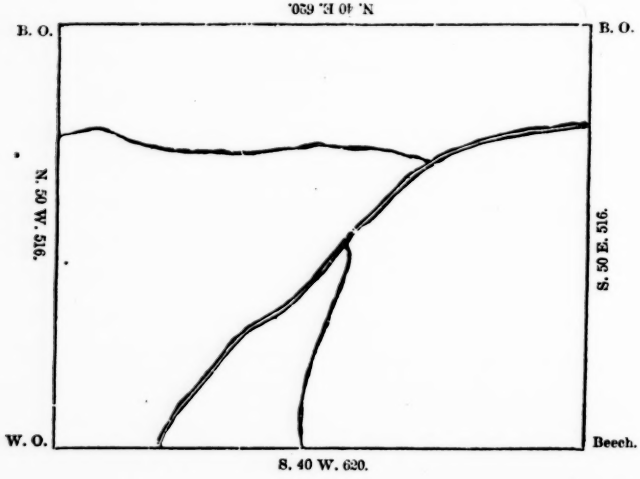
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

95 Also a copy of survey for said Laidley, in these words:

No. 12.



JANUARY 25TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21766, dated 24th December, 1783, in the forks of Ten Mill Creek, bounded as followeth, viz: Beginning at a white oak corner to survey No. 11, and running thence S. 40 W. 620 poles, along a line of said survey, to beech; S. 50° E. 516 pole to black oak; N. 40° E. 620 poles to black oak, corner to survey No. 5; N. 50° W. 516 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

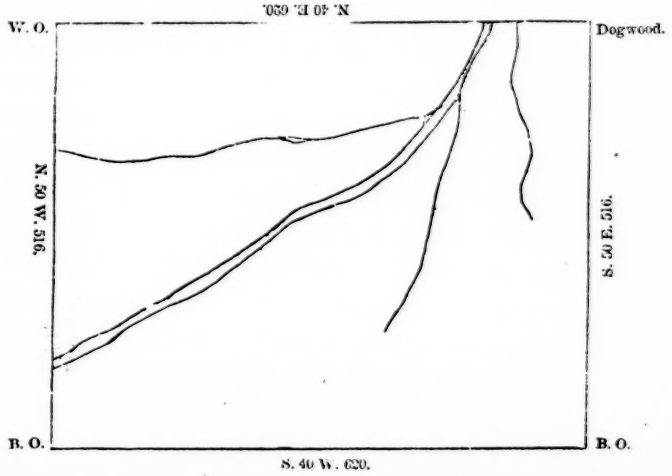
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

96 Also a copy of survey of said Laidley, in these words:

No. 13.



JANUARY 25TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21807, dated 25th Decem'r, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a black oak, east corner to survey No. 12, and running thence S. 40° W. 620 poles, along a line of said survey, to black oak; S. 50° E. 516 pole to a dogwood; N. 40° E. 620 poles to white oak, corner to survey No. 4; N. 50 W. 516 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

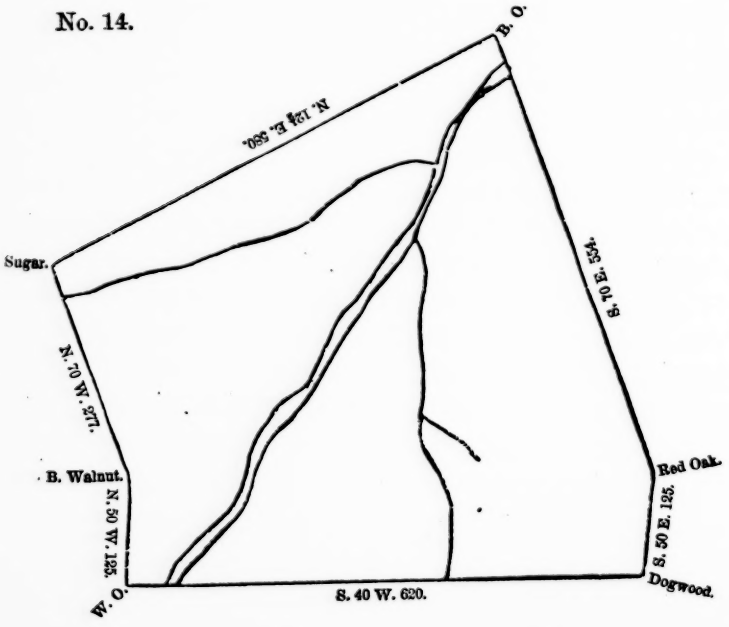
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

97 Also a copy of survey for said Laidley, in these words:

No. 14.



JANUARY 25TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 20935, dated 11th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a white oak, east corner to No. 13, and running thence south 40° W. 620 poles to a dogwood; south 50° east 125 to red oak; S. 70° east 554 to black oak; N. 12½° E. 580 to sugar, corner to survey No. 3; N. 70 W. 277, along a line of said survey, to black walnut; N. 50 W. 125 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

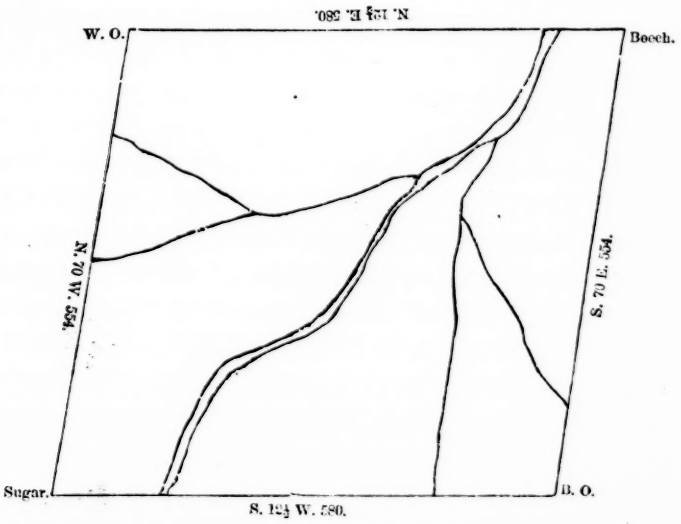
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUG'T, 1853.

98 Also a copy of survey for said Laidley, in these words:

No. 15.



JANUARY 26TH, 1785.

Surveyed for Thomas Laidley, ass'ee Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21146, dated 1st December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a sugar tree, corner to No. 14, and running thence south 12½ west 580 poles, along a line of said survey, to black oak; S. 70 E. 554 poles to a beech, corner to survey No. 2; N. 12½° E. 580 poles to white oak; N. 70° W. 554 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

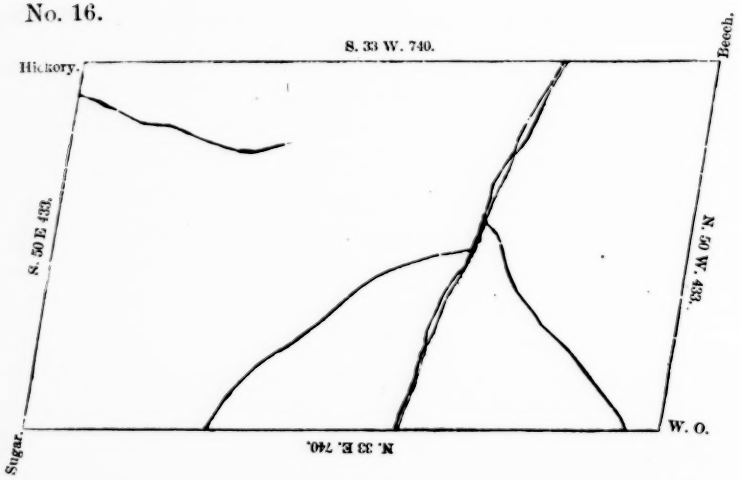
A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUGUST, 1853.

99 Also a copy of survey for said Laidley, in these words:

No. 16.



FEBRUARY 6TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21806, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a hickory in a line of his survey No. 14, and running thence south 33° west 740 poles to a beech; N. 50° W. 433 to a white oak; N. 33° E. 740 to a sugar tree; S. 50° E. 433 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C

Platted by a scale of 200 poles to an inch. No variation.

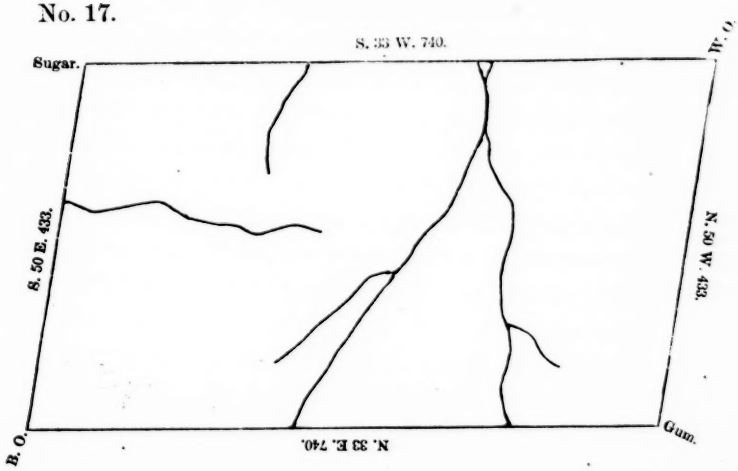
A copy of the record.
Teste:

CYRUS HAYMOND, *S. H C.*

12TH JULY, 1866.

100 Also a copy of survey for said Laidley, in these words:

No. 17.



FEBRUARY 6TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 20914, dated 1st December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a sugar tree, corner to his survey No. 16, and running thence south 33° west 740 poles, along a line thereof, to a white oak; N. 50° W. 433 to a gum; N. 33° E. 740 to a black oak; S. 50° E. 433 to the beginning.

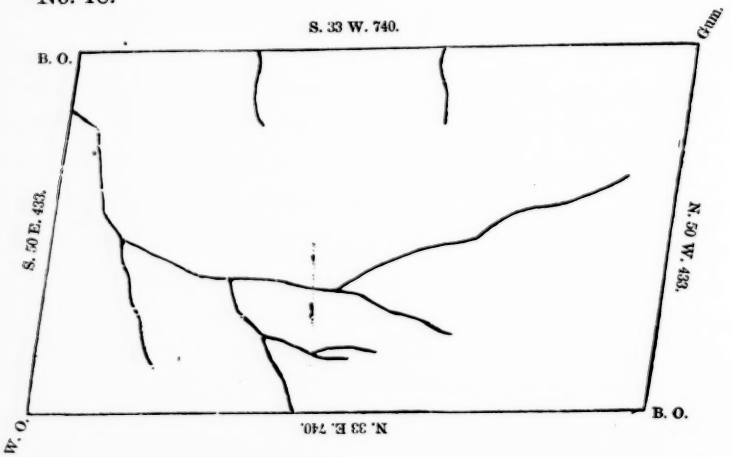
HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste: CYRUS HAYMOND, *S. H. C.*
12TH JULY, 1866.

101 **Also a copy of survey for said Laidley, in these words:**

No. 18.



FEBRUARY 6TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21776, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a black oak, corner to his survey No. 17, and running thence south 33° west 740 poles, along a line thereof, to a gum; N. 50° W. 433 to a black oak; N. 33° E. 740 to a white oak; S. 50° E. 433 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

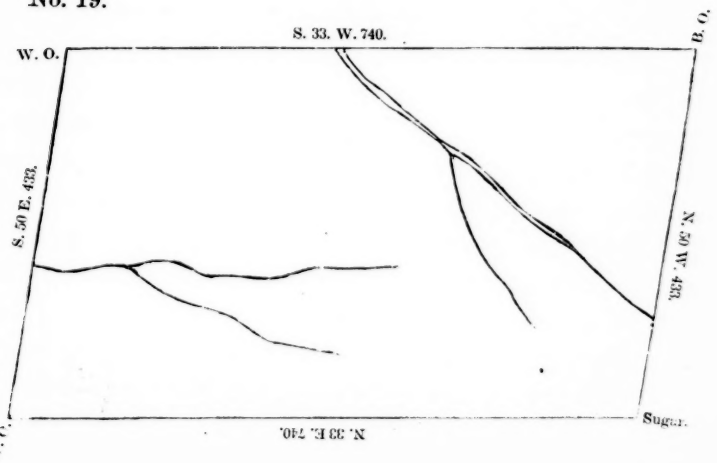
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
12TH JULY, 1866.

CYRUS HAYMOND, *S. H. C.*

102 **Also a copy of survey for said Laidley, in these words:**

No. 19.



FEBRUARY 6TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21787, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a beech, corner to his survey No. 18, and running thence south 33° west 740 poles, along a line thereof, to a black oak; N. 50° W. 433 to a sugar tree; N. 33° E. 740 to a white oak; S. 50° E. 433 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

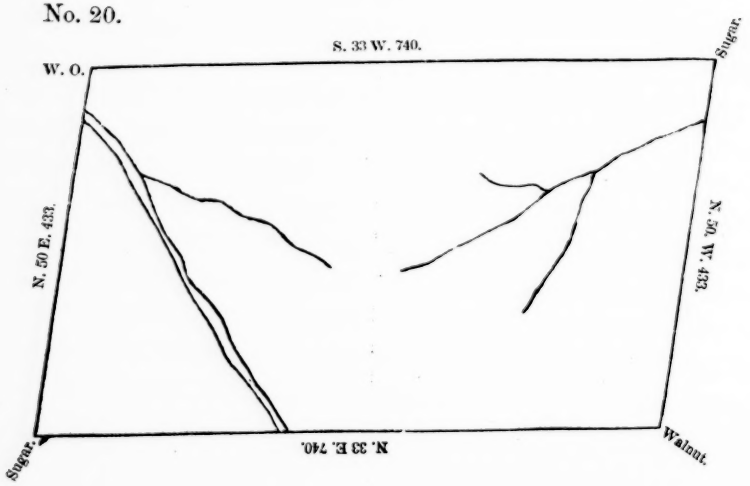
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
12TH JULY, 1866.

CYRUS HAYMOND, *S. H. C.*

103 Also a copy of survey for said Laidley, in these words:

No. 20.



FEBRUARY 7TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21777, dated 24th Decem'r, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a white , corner to his survey No. 19, and running thence north 33° west 740 poles, along a line thereof, to a sugar tree; N. 50° W. 433 to a walnut tree; N. 33° E. 740 to a sugar tree; S. 50° E. 433 to the beginning.

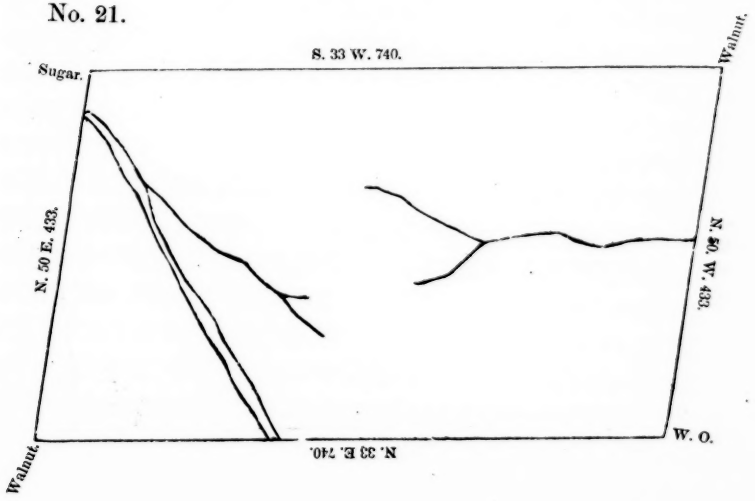
HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste: CYRUS HAYMOND, *S. H. C.*
12TH JULY, 1866.

104 Also a copy of survey for said Laidley, in these words:

No. 21.



FEBRUARY 7TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21093, dated 1st December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a sugar tree, corner to his survey No. 20, and running thence south 33° W. 740 poles, along a line thereof, to a walnut tree; N. 50° W. 43 to a white oak; N. 33° E. 740 to a walnut tree; S. 50° E. 433 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

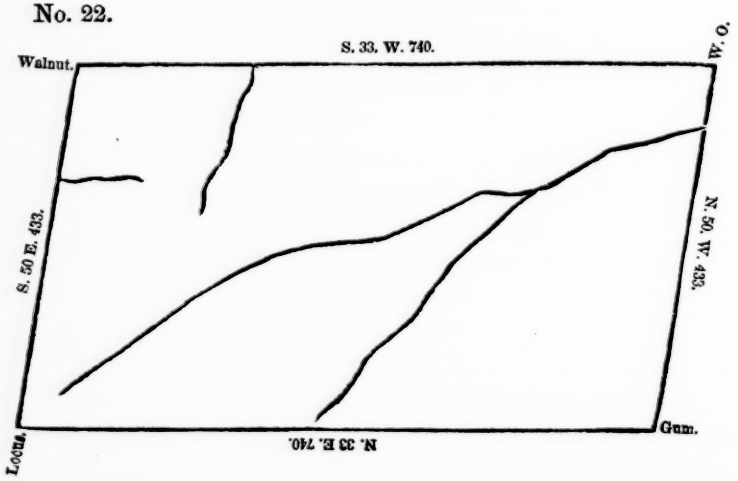
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
12 JULY, 1866.

CYRUS HAYMOND, *S. H. C.*

105 Also a copy of survey for said Laidley, in these words:

No. 22.



FEBRUARY 7TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison county on a land office treasury warrant, No. 21099, dated 1st December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a walnut, corner to his survey No. 21, and running thence south 33° west 740 poles, along a line thereof, to a white oak; N. 50° W. 433 to a gum; N. 33° E. 740 to a locus; N. 50° E. 433 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

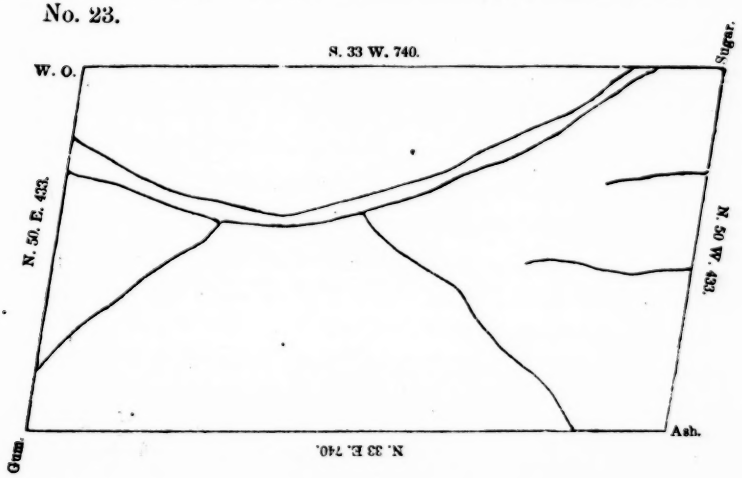
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
12TH JULY, 1866.

CYRUS HAYMOND, *S. H. C.*

106 **Also a copy of survey for said Laidley, in these words:**

No. 23.



FEBRUARY 7TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21809, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a gum, corner to his survey No. 22, and running thence south 50° E. 433 poles, along a line of said survey, to a white oak; S. 33° W. 740 to a sugar tree; N. 50 W. 433 to an ash; N. 33° E. 740 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

200 poles to an inch. No variation.

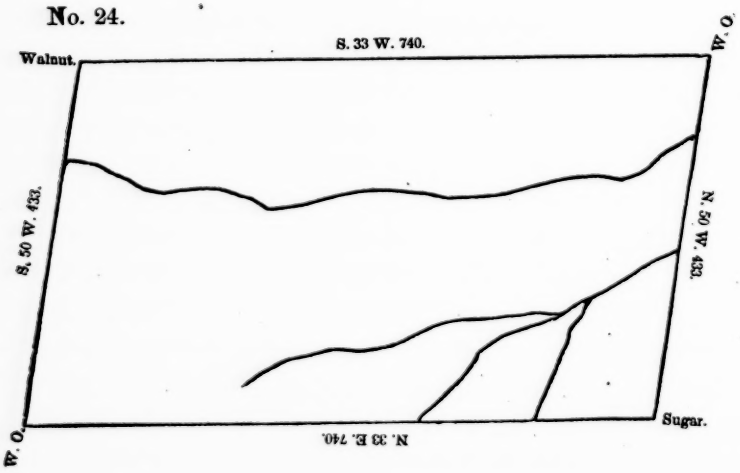
A copy of the record.
Teste:
30TH AUGUST, 1867.

CYRUS HAYMOND, *S. H. C.*

REC. 453—4

107 Also a copy of survey for said Laidley, in these words:

No. 24.



FEBRUARY 7TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21801, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a white oak, and running thence south 50° E. 433 poles, along a line of his survey No. 21, to a walnut tree; S. 33° W. 740 to a white oak; N. 50° W. 433 to a sugar tree; N. 33° E. 740, along a line of his survey No. 23, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

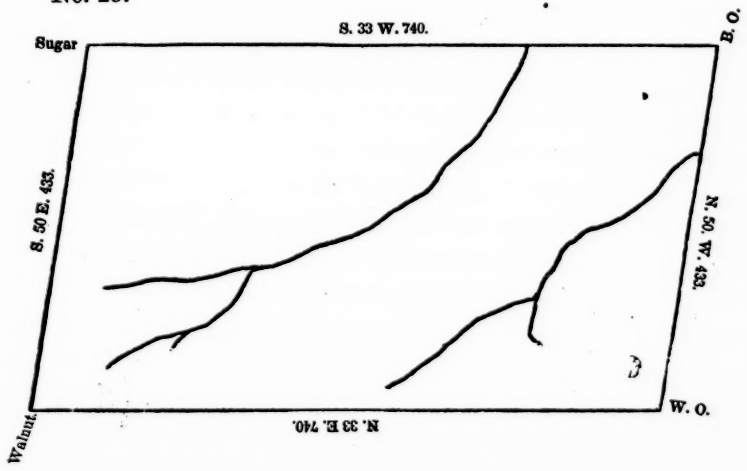
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
30TH AUGUST, 1867.

CYRUS HAYMOND, *S. H. C.*

108 Also a copy of survey for said Laidley, in these words:

No. 25.



FEBRUARY 8TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 20917, d'ed 1st December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a walnut tree, and running thence south 50° E. 433 poles to a sugar tree; S. 33° W. 740 to a black oak; N. 50 W. 433 to a white oak; N. 33° E. 740, along a line of his survey No. 24, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

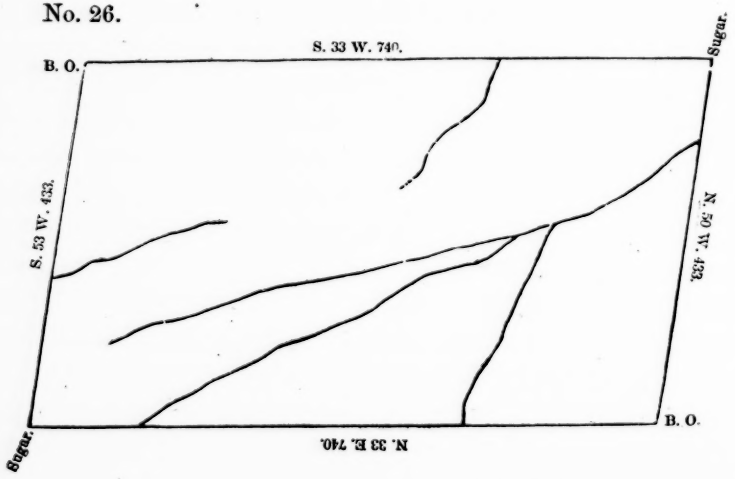
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Test:
30TH AUGUST, 1867.

CYRUS HAYMOND, *S. H. C.*

109 Also a copy of survey for said Laidley, in these words:

No. 26.



FEBRUARY 8TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21089, dated 1st December, 1783, in the forks of Ten Mile Creek, bounded as follows, viz: Beginning at a sugar tree, and running thence south 50 east 433 poles, along a line of his survey No. 19, to a black oak; S. 33° W. 740 to a sugar tree; N. 50 W. 43 to a black oak; N. 33 E. 740, along a line of his survey No. 25, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

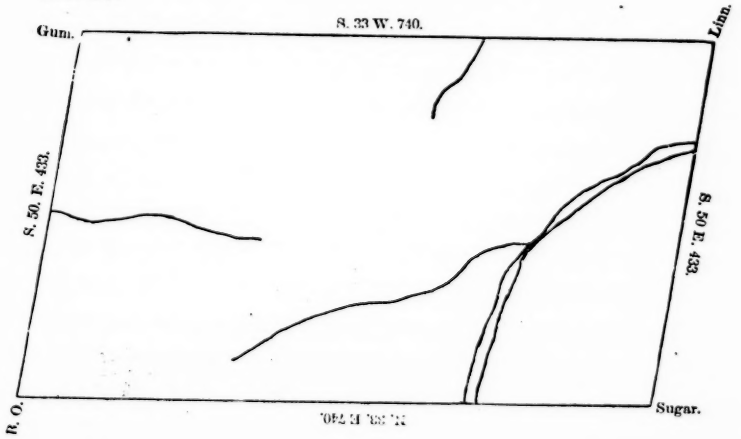
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
30TH AUGUST, 1867.

CYRUS HAYMOND, *S. H. C.*

110 Also a copy of survey for said Laidley, in these words:

No. 27.



FEBRUARY 8TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21767, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a black oak, and running south 50 east 433 poles, along a line of his survey No. 18, to a gum; S. 33° W. 740 to a linn; N. 50° W. 433 to a sugar tree; N. 33 E. 740, along a line of his survey No. 26, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

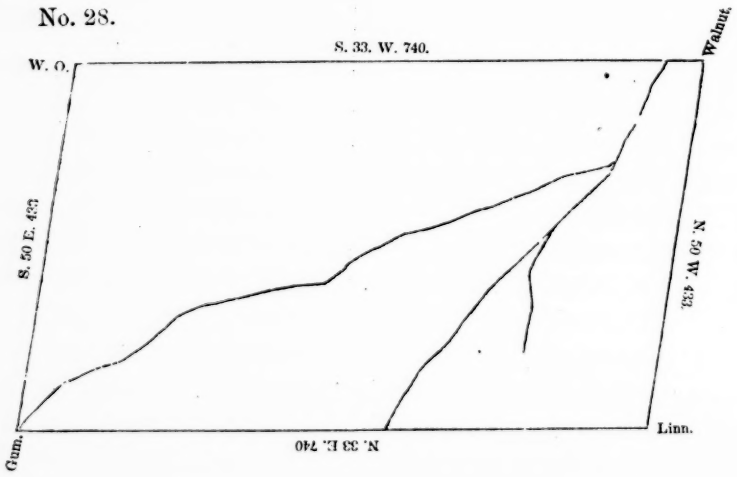
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
30TH AUGUST, 1867.

CYRUS HAYMOND, *S. H. C.*

111 Also a copy of survey for said Laidley, in these words:

No. 28.



FEBRUARY 8TH, 1785.

Survey for Thomas Laidley, ass'ee of Henry Banks, ass'ee, &c., of David Anderson, 2,000 acres of land in Harrison County, on a land office warrant, No. 21782, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as follows, viz: Beginning at a gum, and running thence south 50 E. 433 poles, along a line of his survey No. 17, to a white oak; S. 33° W. 740 to a walnut tree; N. 50° W. 433 to a linn; N. 33° E. 740, along a line of his survey No. 27, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

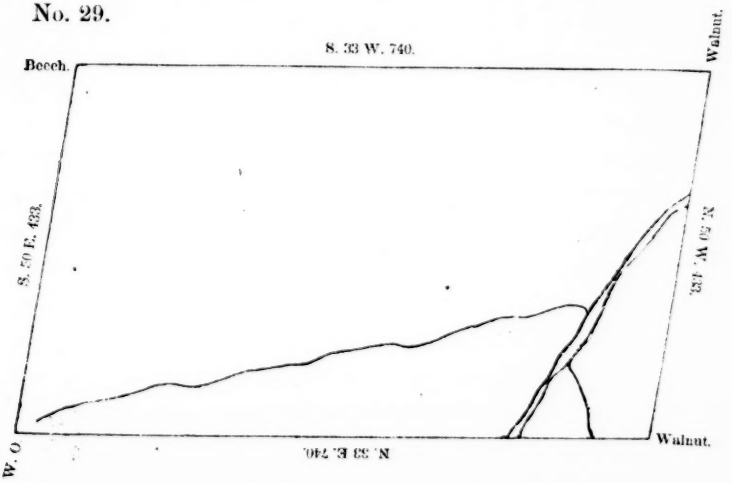
A copy of the record.
Teste:

CYRUS HAYMOND, *S. H. C.*

30TH AUGUST, 1867.

112 Also a copy of survey for said Laidley, in these words:

No. 29.



FEBRUARY 8TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21772, dated 24th December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a white oak, and running thence S. 50° E. 433 poles, along a line of his survey No. 16, to a beech; S. 33° W. 740 to a walnut tree; N. 50° W. 433 to a walnut tree; N. 33° E. 740, along a line of his survey No. 28, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

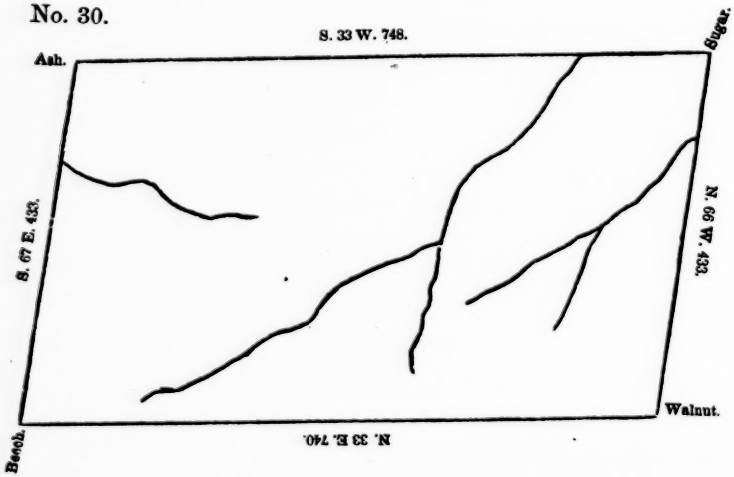
A copy of the record.
Teste:

CYRUS HAYMOND, *S. H. C.*

12TH JULY, 1866.

113 Also a copy of survey for said Laidley, in these words:

No. 30.



FEBRUARY 9TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 20920, dated 1st December, 1783, in the forks of Ten Mile Creek, bounded as followeth, viz.: Beginning at a beech, corner to his survey No. 29, and running thence S. 67° E. 433 poles to an ash; S. 33° W. 748 to a sugar tree; N. 66 W. 433 to a walnut tree; N. 33° W. 740, along a line of his said survey, to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

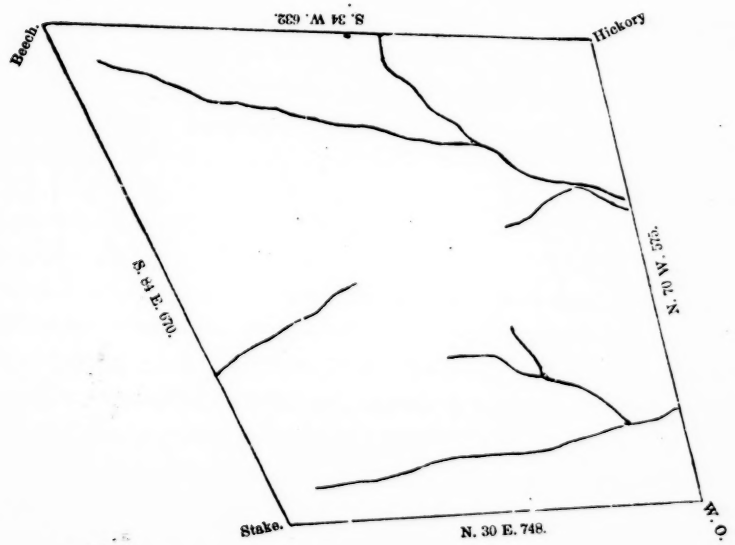
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
12TH JULY, 1866.

CYRUS HAYMOND, *S. H. C.*

114 **Also a copy of a survey for said Laidley, in these words:**

No. 34.



FEBRUARY 10TH, 1785.

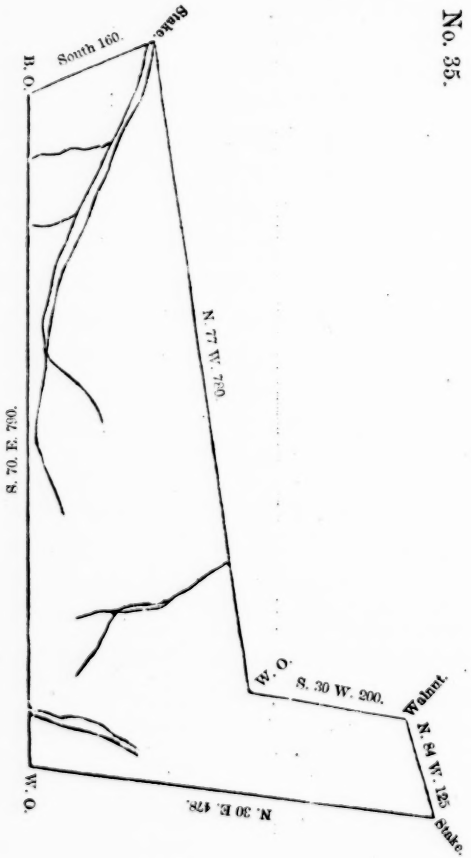
Surveyed for Thomas Laidley, ass'ee Henry Banks, ass'ee of David Anderson, 2,000 acres of land in Harrison County, on a land office treasury warrant, No. 21803, dated 24th December, 1783, on Ten Mile Creek, adjoining his survey No. 30, bounded as followeth, viz: Beginning at a hickory, and running thence south 34° W. 632 poles to a beech; south 84° east 670 poles to a stake; north 30° east 478 poles to a white oak; N. 70 west 575 poles to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
CYRUS HAYMOND, *S. H. C.*
26TH JULY, 1866.

115 **Also a copy of survey for said Laidley, in these words:**



FEBRUARY 10TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, 1,200 acres of land in Harrison County, in part of a land office treasury warrant of 2,000 acres, No. 21755, dated 24th December, 1783, on Ten Mile Creek, adjoining his survey No. 34 and land of Thomas Barkley and Hezekiah Davisson, bounded as followeth, viz: Beginning at a white oak, corner to his said survey, and running thence south 70 east 790 poles to a black oak; south 160 poles to a stake; N. 77° W. 780

to a white oak; S. 30 W. 200 to a walnut tree; N. 84° W. 125 to a stake; N. 30° E. 478 to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

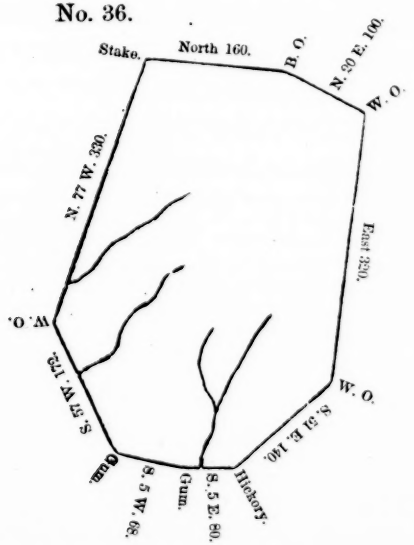
A copy of the record.

THO. HAYMOND,
S. H. C.

3RD NOVEM'R, 1848.

116 Also a copy of survey for said Laidley, in these words:

No. 36.



FEBRUARY 10TH, 1785.

Surveyed for Thomas Laidley, ass'ee of Henry Banks, ass'ee of John Hawkins, 800 acres of land in Harrison County, in part of a land office treasury warrant of 2,000 acres, No. 16011, dated 8th May, 1783, adjoining his 35th survey on the east side, beginning at a black oak, corner to said survey; thence N. 20° E. 100 poles to a white oak; east 320 poles to a white oak; S. 51° E. 140 poles to a hickory; S. 5° E. 80 poles to a gum; S. 5° W. 68 poles to a gum; S. 57 W. 172 poles to a white oak; N. 77° W. 330 to a stake; thence north 160 poles to the beginning.

H. DAVISSON,
Ass't to W'm Haymond, S. H. C.

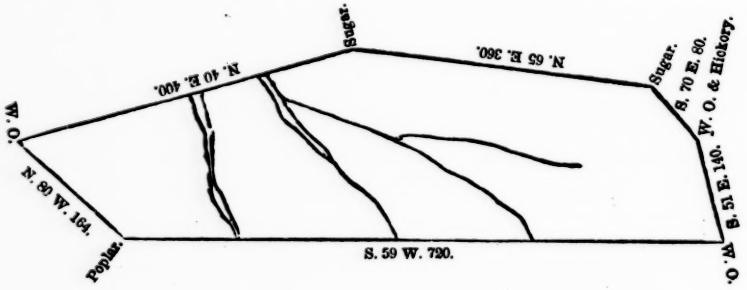
Platted by a scale of poles to an inch. No variation.

A copy of the record.

THO. HAYMOND, *S. H. C.*

25TH AUG'T, 1853.

117 **Also a copy of a survey made for Richard Mason, in these words:**



JANUARY 26TH, 1785.

Surveyed for Richard Mason, ass'ee of Henry Vowels, 927 acres of land, in Harrison County, on part of a land office treasury warrant of 6,000 acres, No. 18160, dated the 28th July, 1873, in the forks of Ten Mile Creek, bounded as followeth, viz: Beginning at a poplar, northwest corner to survey No. 1 claimed by Thomas Laidley, and running thence S. 59° W. 720 poles, along said Laidley's line, to white oak; S. 51 E. 140 to a white oak and hickory; S. 70° E. 80 poles to a sugar; N. 65° E. 360 to a sugar; N. 40° E. 400 to white oak; N. 80° W. 164 to the beginning.

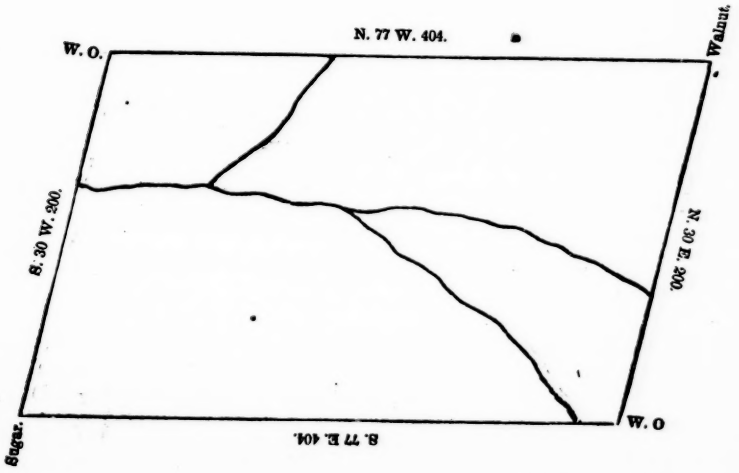
HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.
Teste:
12TH DECEM'R, 1853.

CYRUS HAYMOND, *S. H. C.*

118 Also a copy of survey made for William Barkley, in these words:



8TH AUGUST, 1785.

Surveyed for William Barkley 500 acres of land in Harrison County, in part of a pre-emption warrant of 1,000 acres, No. 1593, dated 15th October, 1781, on both sides of Grass Run, a branch of Ten Mile Creek, adjoining lands claimed by Thomas Laidley, bounded as followeth, viz: Beginning at a sugar tree, and running thence S. 30° W. 200 poles, crossing said run, to a white oak; N. 77° W. 404 poles to a walnut tree; N. 30° E. 200 poles to a white oak; S. 77° E. 404 poles to the beginning.

HEZEKIAH DAVISSON,
Ass't to W'm Haymond, S. H. C.

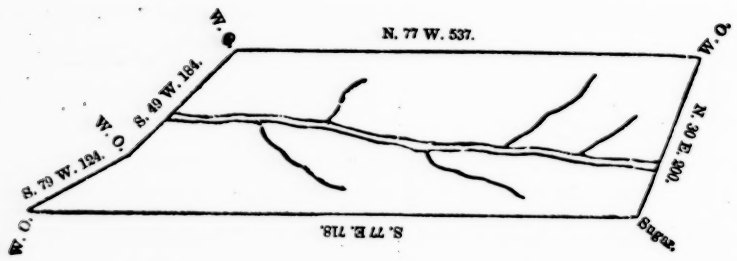
By a scale of 100 poles to an inch. No variation.

A copy of the record.

THO. HAYMOND, *S. H. C.*

19TH NOVEMBER, 1840.

119 Also a copy of survey made for John Lyne, in these words:



FEBRUARY 7TH, 1785.

Surveyed for John Lyne 715 acres of land in Harrison County, on Grass Run, a branch of Ten Mile Creek, on part of a land office treasury warrant of 1,000 acres, No. 21989, dated 24th Decem'r, 1783: Beginning at a white oak, corner to Thomas Laidley, near the creek; thence S. 79° W. 124 poles to a white oak; S. 49° W. 184 poles, crossing Grass Run, to a white oak; N. 77° W. 537 poles, crossing two branches, to a white oak; N. 30° E. 200 poles, crossing Grass Run, above the sugar bottom, to a sugar tree; S. 77° E. 718 poles, crossing a branch, to the beginning.

H. DAVISSON,
Ass't to W'm Haymond, S. H. C.

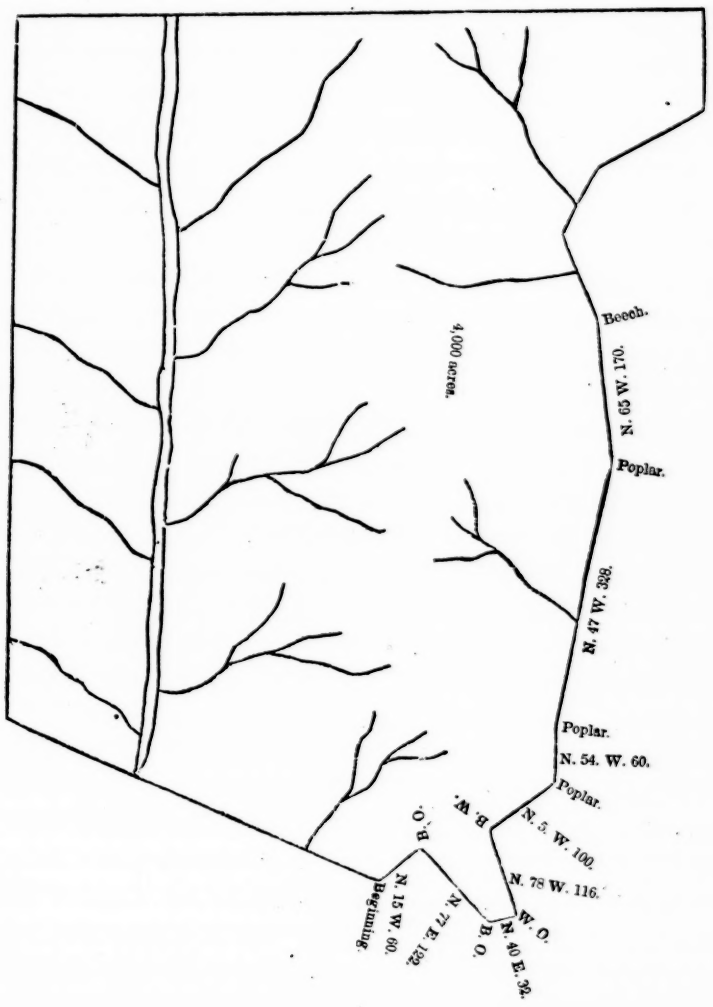
Platted by a scale of 200 poles to an inch. No variation.

A copy of the record.

THO. HAYMOND, *S. H. C.*

3RD NOVEM'R, 1848.

120 Also a copy of a survey made for Joshua Jackson, in these words:



AUGUST 20TH, 1785.

Surveyed for Joshua Jackson, ass'ee of Hezekiah Davisson, ass'ee of Daniel Fink, ass'ee of Thomas Aikins, ass'ee of Richard Claiborne, ass'ee of Fortunatus Crutchfield, 4,000 acres of land in Harrison County, on the right-hand branch of Ten Mile Creek and Jones's Run, adjoining lands of Benjamin Robinson, Peter Cornelison, Isaac Shinn, and Thomas Laidley, on a land office treasury warrant of 9,000 acres, No. 14650,

dated 12th October, 1782, and bounded as followeth, viz: Beginning at a white walnut, corner to Benj'n Robinson's survey; thence, along a line of the same, N. 15° W. 60 poles to a black oak; N. 77° E. 122 poles to a black oak; N. 40° E. 32 poles to a white oak, corner to Peter Cornelison's survey; thence, along a line of the same, N. 78° W. 116 to a black walnut; N. 5° W. 100 poles to a poplar; N. 54 W. 60 poles to a poplar; N. 47 W. 328 poles to a poplar; N. 65 W. 170 poles to a beech, on Isaac Shinn's line; thence, along the same, N. 80 W. 106 p's to two ash's & black walnut; N. 30 W. 85 p's to a walnut; N. 150, crossing Jones's Run, to a sugar; N. 60° W. 114 p's to 3 white oaks, on said Davis-
121 son's line; thence, along the same, S. 30° W. 815 poles, crossing Jones' Run and Ten Mile Creek, to a sugar, on Laidley's line; thence, along the same, S. 65° E. 445 poles to a beech; S. 50° E. 360 poles to a poplar; thence N. 58 E. 490 poles to the beginning.

HEZ'H DAVISSON,
Ass't to W'm Haymond, S. H. C.

A copy of the record.
Teste: CYRUS HAYMOND, *S. H. C.*
29TH AUGUST, 1854.

Also a copy of a grant to Richard Mason, for the lands embraced by said Laidley's survey No. 1, in these words:

The copy said grant is not found on file with the papers of this cause.

Also a copy of a grant to Richard Mason, upon his survey of 927 acres, in these words:

The copy of said grant is not found on file with the papers of this cause.

Also copies of five grants to John Reed, numbered respectively 18, 25, 26, 27, and 28, each for 2,000 acres of land, which are in the words and figures following:

No. 18.

Edmund Randolph, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, by virtue and in consideration of a land office treasury warrant, No. 21776, issued the 24th day of December, one thousand seven hundred & eighty-three, there is granted by the said commonwealth unto John Reed, ass'ee of Thomas Laidley, ass'ee of Henry Banks, who was ass'ee of David Anderson, a certain tract or par-
122 cel of land containing 2,000 acres by survey bearing date the 6th day of February, one thousand seven hundred and eighty-five, lying in the county of Harrison, in the forks of Ten Mile Creek, & bounded as followeth, to wit: Beginning at a black , corner to his survey number seventeen, & running thence south thirty-three degrees west seven hundred & forty poles, along a line thereof, to a gum; north fifty degrees west four hundred & thirty-three poles to a black oak; north thirty-three degrees east seven hundred and forty poles to a white oak; south fifty degrees east four hundred and thirty-three poles to the beginning, with its appurtenances:

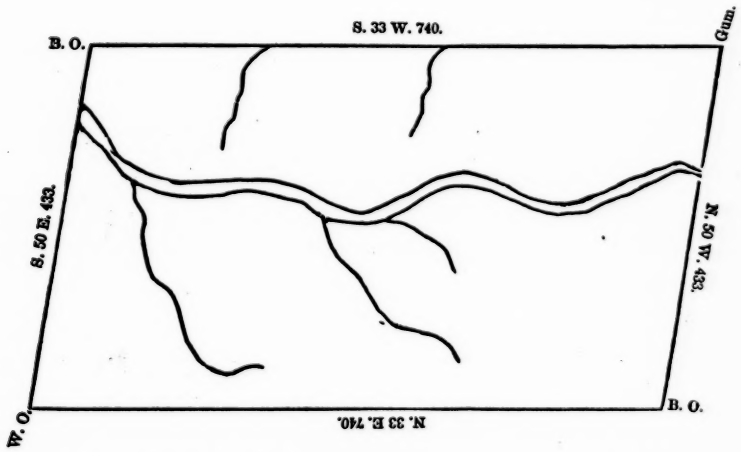
To have and to hold the said tract or parcel of land, with its appurtenances, to the said John Reed and his heirs forever.

In witness whereof the said Edmund Randolph, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said commonwealth to be affixed, at Richmond, on the sixteenth day of January, in the year of our Lord one thousand seven hundred and eighty-seven, and of the commonwealth the eleventh.

EDMUND RANDOLPH.

I certify that the foregoing is a true copy from the records of the Va. land office.

R. E. NASH,
Reg'r Va. L. Office.



Platted by a scale of 200 p'l's to the inch. No variation.

123 25.

Edmund Randolph, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, by virtue & in consideration of land office treasury warrant No. 20917, issued the first day of December, 1783, there is granted by the said commonwealth to John Reed, ass'ee of Tho's Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, a certain tract or parcel of land containing two thousand acres by survey bearing date the 8th day of February, one thousand seven hundred & eighty-five, lying & being in the county of Harrison, in the forks of Ten Mile Creek, and bounded as followeth, to wit: Beginning at a walnut tree, and running thence south fifty degrees east four hundred & thirty-three poles to a sugar tree; south thirty-three degrees west seven hundred and forty poles to a black oak; north fifty degrees west four hundred & thirty-three poles to a white oak; north thirty-three degrees east seven hundred forty poles, along a line of his survey number twenty-four, to the beginning, with its appurtenances:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said John Reed and his heirs forever.

In witness whereof the said Edmund Randolph, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand, & caused the lesser seal of the said commonwealth to be affixed, at Richmond, on the 17th day of January, in the year of our Lord one thousand seven hundred and eight-seven, and of the commonwealth the eleventh.

[SEAL.] E. RANDOLPH.

The foregoing is a true copy from the records of Virginia land office.

R. E. NASH,
Reg. Va. L. Office.

124 26.

Edmund Randolph, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, by virtue & in consideration of a land office treasury warrant No. 21777, issued the 24th day of December, 1783, there is granted by the said commonwealth unto John Reed, ass'ee of Tho's Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, a certain tract or parcel of land containing two thousand acres by survey bearing date the 7th day of February, 1785, lying & being in the county of Harrison, in the forks of Ten Mile Creek, & bounded as followeth, to wit: Beginning at a white oak, corner to his survey number 19, & running thence south thirty-three degrees west seven hundred & forty poles, along a line thereof, to a sugar tree; north fifty degrees west four hundred poles to a black walnut tree; north thirty degrees east seven hundred and forty poles to a sugar tree; south fifty degrees east seven hundred & thirty-three poles to the beginning, with its appurtenances:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said John Reed and his heirs forever.

In witness whereof the said Edmund Randolph, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said commonwealth to be affixed, at Richmond, on the 17 day of January, in the year of our Lord one thousand seven hundred and eighty-seven, and of the commonwealth the eleventh.

E. RANDOLPH.

I certify that the foregoing is a true copy from the records of the Virginia land office.

Aug. 31, 1867.

H. R. SUTTON,
Reg. Va. Land Office.

125 No. 27.

Edmund Randolph, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, by virtue & in consideration of a land office treasury warrant, No. 21767, issued the 24th day of December, one thousand seven hundred and eighty-three, there is granted by the said commonwealth unto Jno. Reed, ass'ee of Tho's Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, a certain tract or parcel of land containing two thousand acres by survey bearing date the 8th day of February,

one thousand seven hundred and eighty-five, lying & being in the county of Harrison, in the forks of Ten Mile Creek, & bounded as followeth, to wit: Beginning at a black oak, & running thence south fifty degrees east four hundred & thirty-three poles (along a line of his survey number 18) to a gum; south thirty-three degrees west seven hundred & forty poles to a line; north fifty degrees west four hundred and thirty-three poles to a sugar-tree; north thirty-three degrees east seven hundred & forty poles (along a line of his survey No. 26) to the beginning:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said John Reed and his heirs forever.

In witness whereof the said Edmund Randolph, esquire, governor of
of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said commonwealth to be affixed, at
126 Richmond, on the 18th day of January, in the year of our Lord one thousand seven hundred and eighty-seven, and of the commonwealth the eleventh.

E. RANDOLPH.

The foregoing is a true copy from the records of the Virginia land office.

R. E. NASH,
Reg. Va. L. Office.

No. 28.

Edmund Randolph, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, by virtue & in consideration of land office treasury warrant No. 21782, issued the 24th day of December, 1783, there is granted by the said commonwealth unto John Reed, ass'ee of Tho's Laidley, ass'ee of Henry Banks, ass'ee of David Anderson, a certain tract or parcel of land containing two thousand acres by survey bearing date the 8th day of February, 1785, lying and being in the county of Harrison, in the forks of Ten Mile Creek, & bounded as followeth, viz: Beginning at a gum, and running thence south 50° east 433 poles, along a line of his survey No. 17, to a white oak; S. 33° W. 740 to a walnut tree; N. 50° W. 433 to a lynn; N. 33° E. 740 poles, along a line of his survey No. 27, to the beginning, with its appurtenances:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said John Reed and his heirs forever.

In witness whereof the said Edmund Randolph, esquire, gov-
127 ernor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said commonwealth to be affixed, at Richmond, on the 17th day of January, in the year of our Lord one thousand seven hundred and eighty-seven, and of the commonwealth the eleventh.

E. RANDOLPH.

The foregoing is a true copy from the records of the Virginia land office.

R. E. NASH,
Reg. Va. L. Office.

And the defendant gave in evidence the land-books of the commissioners of the revenue for the county of Harrison, whereby it appeared,

and the parties agreed, that the said lands granted to John Reed had not for many years previous to the year 1831, or in that year, or any year thereafter, previous to the year 1839, entered on the books of the commissioners of the revenue for the county of Harrison, or either of them, in which the said lands lay, and were forfeited to, and vested in, the Commonwealth of Virginia in the year 1836.

And the defendant gave in evidence two certificates of the auditor of public accounts, which are in the words and figures following:

I, William F. Taylor, auditor of public accounts for the State of Virginia, do hereby certify that there was not, and is not, entered on either of the land-books of the commissioners of the revenue of the county of Ohio, formerly in the State of Virginia, but now in the State of
128 West Virginia, for either of the years 1788, 1789, 1790, 1791, 1792, 1793, 1795, 1796, 1797, or 1798, in the name of Jabez Bacon, any tract of land containing 1,000 acres, or 922 acres, or 156 acres, or 20,000 acres; that there was not, and is not, entered on either of the land-books of the commissioners of the revenue of the said county of Ohio, for either of the years 1799, 1800, 1801, 1802, 1803, 1805, 1806, 1807, 1809, 1810, 1811, 1812, 1813, or 1814, in the name of Jabez Bacon or Daniel Bacon or Nathaniel Bacon, any tract of land containing 1,000 acres, or 922 acres, or 156 acres, or, in the name of Daniel Bacon or Nathaniel Bacon, any tract of land whatever; that there was, and is, entered on the land-books of the commissioner of the revenue of the said county of Ohio, for each of the fourteen years last mentioned, in the name of Jabez Bacon, a tract of land containing 20,000 acres, without description as to location on either of the said books for the previous years, but described on the said books for the said years 1812, 1813, and 1814 as on waters of Middle Island, and on said book for the said last-mentioned year as south 75 miles from the court-house; that the said Jabez Bacon is assessed on the said book for the year 1799 with four dollars and eighty-six cents tax on the said land for that year; on each of the said books for the years 1800, 1801, 1802, 1803, 1805, 1806, 1807, 1809, 1810, 1811, and 1812, with four dollars and eighty cents
129 tax on the said land for each of those years; on the said land-book for the year 1813 with six dollars and forty cents tax on the said land for that year; and on the said book for the year 1814 with eight dollars and fifty cents tax on the said land for that year; that the said tract of land entered on the said book as aforesaid was in each of the said years 1799, 1800, 1801, 1802, 1803, 1805, 1806, 1807, 1809, 1810, 1811, 1812, 1813, and 1814 returned delinquent for the non-payment of the taxes aforesaid assessed thereon as aforesaid for such years respectively; that on the 20th day of May, 1805, the taxes assessed on the said tract of land as aforesaid for the years 1801 and 1802 were, on the warrant of the auditor of public accounts, paid into the treasury; on the 17th day of February, 1810, the taxes so assessed thereon for the years 1803, 1804, 1805, 1806, 1807, and 1809 were paid likewise; and on the 14th day of December, 1812, the taxes so assessed thereon for the years 1810 and 1811 were paid likewise; that the taxes assessed on the said tract of land containing 20,000 acres as aforesaid for the
130 said years 1799, 1800, 1812, 1813, and 1814 were never paid, nor was any part thereof paid, so far as the records of this office show.

Given under my hand at the auditor's office, in the city of Richmond, this 7th day of May, 1866.

W'M F. TAYLOR, *Aud.*

[Inter. rev., 5 cts., W. F. T., May 7, 1866.]

I, William F. Taylor, auditor of public accounts for the State of Virginia, hereby certify that I have caused the land-books of the commissioner of the revenue of the county of Harrison, formerly in the State of Virginia, now in the State of West Virginia, for the years 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, and 1839, to be searched, and that there was not and is not entered on either of the said books, in the name of Jabez Bacon or Daniel Bacon or Nathaniel Bacon or Philo Murray or Peter Smith, or the heirs or estate of either of them, or Peter S. Smith, or Gerrit Smith and Daniel Cady, or Gerrit Smith alone, or Chapman Biddle, Mary L. C. Biddle, Walter L. Cochran, John Cochran, Ellen Walter, William Kemeys, Catharine Kemeys,
131 Gerrit Smith, Cornelia S. C. Barklay, Gerrit H. Smith, James W. Cochrane, Abra Baird, and Cornelia A. Baird, or any or either of them, any tract of land containing 1,000 acres, or 922 acres, or 156 acres, or 20,000 acres.

Given under my hand, at the auditor's office, in the city of Richmond, Va., this 7th day of May, 1866.

W'M F. TAYLOR, *Aw'r.*

[Inter. rev. 5 cts., W. F. T., May 7, 1866.]

Also copies of six receipts from the office of treasury of Virginia, filed in the auditor's office of Virginia, with the certificate of the auditor annexed, which are in the words and figures following:

TREASURY, 31*st March*, 1796.

Received, of Jabez Bacon, three dollars and eighty-eight cents, on account of the tax on land returned by the sheriff of Ohio for the year 1789.

$3 88 cents. E. B. LACY, *C. T.*

TREASURY, 17*th October*, 1799.

Received, of Jabez Baken, thirty-four cents, on account of the redemption of his land returned by *by* the sheriff of Ohio for non-
132 payment of the taxes for the years '94, '95, '96, and 1797.

34 cents. LEWIS BERKELEY.

TREASURY OFFICE, 20*th May*, 1805.

Received, of Jabez Bacon, nine dollars and sixty cents, on account of the redemption of his land returned by the sheriff of Ohio for non-payment of taxes for the years 1801 & 1802.

$9 60. RO. BATES.

TREASURY OFFICE, 17 *February*, 1810.

Received, of Jabez Bacon, thirty-six dollars —— cents, on account of the redemption of his land returned by the sheriff of Ohio for non-payment of the tax for the years 1803, 1804, 1805, 1806, 1807, & 1809.

LINNAUS SMITH.

TREASURY OFFICE, 14 *Decem'r*, 1812.

Received, of Jabez Bacon, nine dollars 60 cents, on account of the redemption of his land returned by the sheriff of Ohio for non-payment of the tax for the years 1810 & 1811.

FRAN'S LIN'S SMITH.

133 $9 16. TREASURY OFFICE, 9 *Feb.*, 1818.

Received, of Jabez Bacon, nine dollars 16 cents, on account of the redemption of his land returned by the sheriff of Tyler for the non-payment of taxes thereon for the year 1815.

M. SMITH.

I, William F. Taylor, auditor of public accounts for the State of Virginia, hereby certify that the foregoing are copies of all the treasures receipts for taxes and damages, or either, on lands returned delinquent for non-payment of taxes in the name of Jabez Bacon, which are filed in this office.

Given under my hand, at the auditor's office, in the city of Richmond, Va., the 7th day of May, 1866.

W'M F. TAYLOR, *Au'r.*

[Inter. rev., 5 cents, W'm F. T., May 7, 1866.]

Also an abstract from the land books from the commissioners of the revenue for the county of Tyler, and an abstract form the list of lands delinquent in the county of Tyler, with the certificate thereto annexed, and a certificate of the recorder of the county of Doddridge, which
134 said papers had been filed by the plaintiffs, in the words and figures following:

Year.	Name of person charged & residence.		Description.	Value of land.		Amount of tax.		Tax for county purposes.	Commissioner's remarks.
						Dol. C'ts.		*D. C'ts.*	
1815	Jabez Bacon	20,000	Waters of M. I. Creek	$1,000	....	8 50	....		
1816	Jabez Bacon	20,000	" " " " "	1,000	....	7 50	....		
1817	Jabez Bacon	20,000	" " " " "	1,000	....	7 50	....		
1818	Peter Smith	20,000	" " " " "	1,000	....		....		Alienated by Philo Murray.
1819	Peter Smith	20,000	" " " " "	1,000	....	7 50	....		
1820	Peter Smith	20,000	McElroy Fork	10,000	....	12 50	....		
1821	Peter Smith, N. York	20,000	" "	10,000	....	9 50	....		
1822	Peter Smith, "	20,000	" "	10,000	....	9 00	....		
1823	Peter Smith, "	20,000	" "	10,000	....	8 00	....		
1824	Peter Smith, "	20,000	" "	10,000	....	8 00	....		
1825	Peter Smith, "	20,000	" "	10,000	....	8 00	....		
1826	Peter Smith, "	20,000	" "	10,000	....	8 00	....		
1827	Peter Smith, "	20,000	" "	10,000	....	8 00			
1828	Peter Smith, "	20,000	" "	10,000	....	8 00		33⅓ per cent. for building bridges.	
1829	Peter Smith, "	20,000	" "	10,000	....	8 00			
1830	Peter Smith, "	20,000	" "	10,000	....	8 00	....		
1831	Peter Smith, "	20,000	" "	10,000	....	8 00			
1832	Peter Smith, "	20,000	" "	10,000	....	8 00			
1833	Peter Smith, "	20,000	" "	10,000	....	8 00	....		
1834	Peter Smith, "	20,000	" "	10,000	....	8 00	....	2 67	
1835	Peter Smith, "	20,000	" "	10,000	....	8 00	....	2 67	
1836	Peter Smith, "	20,000	" "	10,000	....	8 00	....	35 per ct. on tax.	
1837	Peter Smith, "	20,000	" "	10,000	....	8 00			
1838	Peter Smith, "	20,000	" "	10,000	....	10 00	....	3 50	Elias Williams to pay.
1839	Peter Smith, "	20,000	" "	10,000	....	10 00	....	3 50	
1840	Peter Smith, "	20,000	" "	10,000	....	5 00	....	1 00	
1841	Oberlin Collegiate Institute, N. R.	20,000	" "	5,000	....	6 25	....	1 57	Conveyed by Peter Smith to Gerrit Smith & Dan'l Cady, and by Cady to Gerrit Smith, & by Gerrit Smith to Oberlin College.
1842	Oberlin Collegt. Inst	20,000	" "	5,000	....	6 25	....	1 57	
1843	Oberlin Collegt. Inst	20,000	" "	5,000	....	7 50	....	75	
1844	Oberlin Collegt. Inst	20,000	Flint Run of McElroy	5,000	....	6 25	....		

STATE OF WEST VIRGINIA, *County of Tyler, ss:*

I, Ellis T. Nicklin, recorder of the county aforesaid, do certify that I have carefully searched the commissioner's books of said county for land charged therein to Jabez Bacon, Daniel Bacon, Nathaniel Bacon, Peter Smith, and Philo Murray, from the years 1814 to the year 1845, and that the foregoing is a true abstract of what appears on said books in relation thereto.

Given under my hand this 10th day of March, A. D. 1865.

E. T. NICKLIN.

[Inter. rev., 5 cents, E. T. N., March 10, 1865.

135 Year.	Name.	Number of acres.	Description of land.	Amount of tax.	County purposes.	Why returned.
				D. Cts.	*D. Cts.*	
1815	Jabez Bacon	20,000	Waters of M. I. Creek	8 50	.....	No inhabitant.
1826	.....	.....	..... "	8 00	.....	No inhabitant.
1841	Oberlin Collegiate Institute	20,000	McElroy Fork	6 25	1 57	..... " .....

STATE OF WEST VIRGINIA,
County of Tyler, ss:

I, Ellis T. Nicklin, recorder of the county aforesaid, do certify that I have carefully searched the lists of land returned delinquent in the county of Tyler for the non-payment of taxes charged thereon in the names of Jabez Bacon, Daniel Bacon, Nathaniel Bacon, Peter Smith, & Oberlin Collegiate Institute, & that the foregoing is a true abstract of what appears on said lists in relation thereto.

Given under my hand this 10th day of March, A. D. 1865.

E. T. NICKLIN.

[Inter. rev., 5 cents, E. T. N., March 10, 1865.]

136 *List of real estate in the county of Doddridge, delinquent for the non-payment of taxes thereon for the year* 1857.

Names of persons.	Residence.	Estate held.	Quantity of land.	Description and local situation.	Distance and bearing from C. H.	Amount of taxes.	Why returned.
Thompson, Uriah	U. K.	F. S.	10,827½	McElroy	N. E. 11	43 31	No property found, out of which to make the taxes.

I, Charles Davis, sheriff of the county of Doddridge, do swear that the foregoing list is, I verily believe, correct and just; that I have received no part of the taxes for which the real estate therein mentioned is returned delinquent; and that I have used due diligence to find property within my county liable to distress for the said taxes, but have found none.

CHA'S C. DAVIS, *S. D. C.*

Sworn to and subscribed before me, T. S. Gray, a justice for Doddridge County, this 24 day of April, 1858.

T. S. GRAY, *J. P.*

137 I, Robert A. Jeffry, commissioner of the revenue for the county of Doddridge, do certify that the within delinquent list of real estate in the county of Doddridge, returned for the non-payment taxes thereon for the year 1857 by the sheriff of Doddridge County, has been submitted to me, and it is my opinion that said list is correct in each case returned, and, so far as my knowledge extends, the taxes could not be made by the said sheriff.

Given under my hand.

ROB'T A. JEFFREY.

Subscribed and sworn to this 28th day of June, 1858, before me, the undersigned subscriber.

A. LOWTHER, *J. P.*

STATE OF WEST VIRGINIA,
Doddridge County, to wit:

I, A. C. Holmes, recorder of the county of Doddridge, certify that the within is an accurate abstract from the list of real estate in the county of Doddridge delinquent for the non-payment of taxes thereon
138 for the year 1857 kept in the office of the recorder of the said county of Doddridge.

Given under my hand this 2nd day of September, 1867.

A. C. HOLMES, *Recorder.*

And the defendant read in evidence three grants to Caleb Boggess—one for 586 acres, one for 40 acres, and the other for 156 acres of land, which are in the words and figures following:

William Smith, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, in conformity with a survey made on the seventh day of April, one thousand eight hundred and forty-six, by virtue of land office treasury warrant No. 15433, there is granted by the said commonwealth unto Caleb Boggess a certain tract or parcel of land, containing five hundred and eighty-six acres, lying and being in the county of Doddridge, on Robason's Fork of the McRoy, and bounded as follows, viz: Beginning at a dogwood, in a line of Thomas Swiger, on the
139 north side of East Run; thence S. 35° W. 110 poles to a stake on Round Bottom Run; S. 55° E. 24 poles to a white oak on a hillside; S. 50° W. 50 poles to a beech on the bank of a drain; N. 69° W. 306 poles to a beech & poplar in Israel Allen's line; thence north 388 poles, passing the corner of Allen & Bonnel, crossing the creek to a maple, corner of Charles Bonne & Swiger; thence S. 45° E. 520 poles, with Swiger's line, to the beginning, with its appurtenances:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said Caleb Boggess and his heirs forever.

In witness whereof the said William Smith, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and forty-six, and of the commonwealth the seventy-first.

[SEAL.] W'M SMITH.

Caleb Boggess hath title to the within-granted land.

S. H. PARKER,
Reg. L. Office.

140 William Smith, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, in conformity with a survey made on the tenth day of December, one thousand eight hundred and forty-six, by virtue of land office treasury warrant No. 15433, there is granted by the said commonwealth unto Caleb Boggess a certain tract or parcel of land, containing forty acres, lying and being in the county of Doddridge, on Ragen's Run of the McRoy, of the Middle Island, and bounded as follows, viz: Beginning at a white oak on the N. side of said run; thence S. 55 E. 103 poles to a hickory on a point; S. 35 W. 61 poles, crossing Ragen's Run at the old Harrison line, to a dogwood; N. 55 W. 108 poles to a stake and pointers; N. 40 E. 62 poles, crossing a corner of T. K. Knight, and crossing said run, to the beginning, with its appurtenances:

To have and to hold the said tract or parcel of land to the said Caleb Boggess and his heirs forever.

In witness whereof the said William Smith, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and
141 caused the lesser seal of the said commonwealth to be affixed, at Richmond, on the thirtieth day of September, in the year of our Lord one thousand eight hundred and forty-seven, and of the commonwealth the seventy-second.

[SEAL.] W'M SMITH.

Caleb Boggess hath title to the within-granted land.

S. H. PARKER,
Reg. L. Office.

John B. Floyd, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, in conformity with a survey made the twenty-sixth day of April, one thousand eight hundred and forty-nine, by virtue of land office treasury warrant No. 17252, there is granted by the said commonwealth unto Caleb Boggess a certain tract or parcel of land, containing one hundred and fifty-eight acres, lying and being in the county of Doddridge, on Reggins' Run, a branch of McLeroy's Fork of Middle Island Creek, and bounded as follows, viz: Beginning at a
142 hickory, a corner to said Boggess' survey of 40 acres; thence, with a line thereof, S. 35 W. 100 poles, crossing said Reggins' Run, to a gum; thence S. 30 E. 160 p's to a white oak and hickory; thence S. 45 E. 50 p's to a white oak; thence south 74 p's, crossing the old ridge road, to a chesnut oak; thence S. 85 E. 30 p's to a white oak; thence N. 40 8 E. 88 p's, crossing said run, to a maple; thence N. 25 W. 40 p's to a gum; thence N. 35 W. 98 p's to a gum; thence N. 20 W. 60 poles to a white oak; thence N. 30 W. 101 poles to the beginning, with its appurtenances:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said Caleb Boggess and his heirs forever.

In witness whereof the said John B. Floyd, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said commonwealth to be affixed, at Richmond, on the thirty-first day of December, in the year of our Lord one thousand eight hundred and forty-nine, and of the commonwealth the seventy-fourth.

[SEAL.] JOHN B. FLOYD.

143 Caleb Boggess hath title to the within-granted land.

S. H. PARKER,
Reg. L. Office.

Also a grant to John R. Boggess for 5,200 acres of land; which is in the words and figures following:

Joseph Johnson, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye that, in conformity with a survey made on the twentieth day of June, one thousand eight hundred and fifty-three, by virtue of land office treasury warrants Nos. 20498, 20955, 20661, 20954, & 21291, there is granted by the said commonwealth unto John R. Boggess a certain tract or parcel of land, containing five thousand two hundred acres, lying in Doddridge County, on the south side of the McElroy

Fork of Middle Island Creek, on Robinson's Fork, Big Battle, Little Battle, Reggins' Run, and Flint Run, branches thereof, and bounded as follows, viz: Beginning at 2 white oaks and 2 hickory pointers, on the old Tyler ridge road, between the heads of Brush Run & Ralph's
144 Run; thence running N. 32° E 209 p's to a large beech, on the west side of Reggins' Run, the S. W. corner of lot No. 4 of the Leatherman connection of surveys, and corner to land now owned by John Ash; thence, with said Ash's line and a line of the aforesaid lot, N. 31° E. 293 p's, crossing said Reggins Run, to a stone pile, with a white oak & beech pointers, near Benjamin Yeater's mills, a corner to lot No. 6 of the aforesaid connection of surveys, and to land now owned by said Benjamin Yeater; thence, with said Yeater's line and a line of the said 6th lot of the said connection, S. 74° E. 258 p's to a white oak on said line, corner to a survey of 100 acres made by Joshua Allen 15th Dec., 1851; thence, with two lines thereof, S. 45° W. 106 p's to a white oak, S. 20° E. 60 p's to a chestnut oak, on a line of a survey of 104 acres made for Harriet Haney 18th of Dec., 1851; thence, with 10 lines thereof, N. 78° W. 6 p's to a pine, S. 2° E. 68 p's to a white oak, S. 42° E. 33 p's to c. oak, S. 72 E. 68 p's to a red oak, N. 30° E. 61½ p's to a white oak, N. 57° E. 80 p's to c. oak. N. 20 E. 8 p's to a c. oak, N. 30 W. 52 p's to a gum & w. oak, N. 4 W. 10 p's to a stone, on a
145 line of the aforesaid 6th lot of the said Leatherman; thence, with the same, (land now owned Joshua & Jesse Allen,) S. 74° E. 114 p's to a black oak & w. oak, corner to said Jesse Allen & of lots Nos. 6, 7, & 8 of the aforesaid connection; thence, with said Allen's line, a line of the aforesaid 8th lot, S. 1° W. 173 poles, crossing Little Battle Fork of Robinson's Fork, to a stone on said line; thence S. 82° W. 92 p's, crossing s'd Battle to a beech, corner to a survey of 172 acres patented to Cha's Bonnell on the 30th November, 1848; thence, with 8 lines thereof, south 104 p's to a white oak, S. 50° W. 44 p's to a beech, S. 55° E. 55 p's to a w. oak, south 100 p's to a w. oak, S. 72° W. 52 p's to a hickory & sugar, S. 12° W. 60 p's to a white oak, N. 82 E. 126 p's, crossing s'd Battle, to a sugar, N. 105 p's to a stone on s'd line; thence, S. 89° E. 15 p's to a stone pile, with 2 beeches, lynn, & sugar pointers, corner to the s'd 8th lot of the said connection & land now owned by Ja's A. Robey; thence, with the said Robey's line, a line of the aforesaid 8th lot, S. 89° E. 265 p's to a sugar on said line, on the west bank of Big Battle Fork; thence up the same S. 26° W. 16 poles to a beech on the west bank of the same, corner to a survey of 232 acres made for Hugh Tate 16th Dec., 1847; thence, with 13 lines, N. 75° W. 28 p's to a
146 w. oak, S. 35° W. 62 p's to a w. oak, S. 70 p's to pointers, S. 30° W. 183 p's to a hickory, S. 85° W. 60 p's to a white oak, S. 90 p's to a b. oak, S. 80° E. 183 p's to an ironwood & p't's, N. 43 E. 76 p's, crossing said Battle Fork, to a beech, N. 37° W. 100 p's to a w. oak, N. 22° E. 56 p's to a beech, N. 9° W. 62 p's to a sugar, N. 65 E. 67 p's to a w. oak; S. 70° E. 41 p's to a poplar, on a line of a survey of 168 acres made for said H. Tate 15th of May, 1847; thence, with 6 lines thereof, S. 10 E. 120 p's, S. 49° E. 86 p's to a white oak, S. 88° E. 154 p's to a c. oak, N. 25 E. 62 p's to a hickory, N. 37° W. 120 p's to a white oak, N. 43 ° W. 177 p's to a beech, corner to the aforesaid 232 acres of s'd Tate; thence, therewith, N. 38° W. 120 p's to the east bank of s'd Battle; thence, down the same, N. 26 E. 17 p's to a stone on the east bank thereof, on the aforesaid line of the said Roby, & of the said 8th lot; thence, therewith, S. 89° E. 134 p's to a birch, corner of the s'd Leatherman lot; thence, with another line thereof, N. 12 p's to a beech & poplar, corner to a survey of 586 a's made for & patented to C. Bog-

gess, sr., 13th November, 1846; thence, with 2 lines thereof, S. 69 E. 290 p's to a stone, bearing N. 69° W. 2 poles from a beech, N. 35 E. 166 p's, crossing R'o Fork, to a dogwood, on a line of the 10th lot of the s'd Leatherman; thence with S. 45 E. 23 p's to a white oak & maple, corner to lot No. 10, & on a line of lot No. 12 of the said connection;
147 thence, with 2 lines of the s'd 12th lot, which is now owned by Cha's Bonnell, Hugh Tate, & Winter Hutson, S. 35 W. 112 p's, crossing Robinson's Fork again, to a white oak & pointers, S. 34° E. 344 p's, crossing Sugar Camp Run & Old Camp Run, to a poplar on the head of a drain of Lynn Camp Run, corner to lots Nos. 12 & 13 of the Leatherman surveys; thence N. 84° W. 38 p's to a stake on the top of a point; thence S. 74° W. 18 p's to a maple, with 2 w. oaks, 3 c. oaks, maple, & pointers on the ridge between Old Camp & Lynn Camp Runs, & corner to lot No. 11 of Sam'l P. Moore's connection of surveys, now owned or claimed by Josiah Adams; thence, with a line of s'd lot, S. 81 W. 549 p's, crossing Raun or Bottom Run & Big Battle Fork, to a large sugar, with 2 beeches, & w. walnut pointers, on the west bank of the s'd Battle Fork, corner to the 11 & 12th lots of the s'd Moore connection of surveys; thence, with a line of the s'd 12th lot, now owned or claimed by the s'd Josiah Adams, S. 61° W. 242 p's to a chestnut oak, with oak & chestnut pointers, on s'd line on the west edge of the old Tyler ridge road; thence, with the meanders of the s'd road, N. 14° W. 47½ to a w. oak, N. 65¾ W. 40 p's to a w. oak, N. 26½ W. 16 p's to a w. oak, N. 56 W. 56 p's to a cucumber, N. 42° W. 27 p's to a w. oak, N. 3 W. 43½
148 p's to a w. oak, N. 50° W. 26 p's, N. 60 W. 17 p's, S. 89 W. 36 p s, S. 80 W. 25 p's, N. 79° W. 77 p's, making in all 411 p's, to a w. oak, with c. oak, chestnut, & service pointers, corner to a survey of 150 a's made for C. Boggess, sr., 26th Ap'l, 1849; thence, with 5 lines thereof, N. 40° E. 88 p's, crossing Reggins' Run, to a maple, N. 25 W. 40 p's to a gum, N. 35 W. 98 p's to a gum, N. 20 W. 60 p's to a w. oak, N. 30° W. 101 p's to a hickory, corner to a survey of 40 a's, made for C. Boggess, sr.; with 3 lines thereof, N. 50° W. 103 p's to a w. oak, S. 40 W. 62 p's, crossing s'd Reggins's Run, to a stone, S. 55 E. 108 p's to a dogwood, on a line of the aforesaid 158 a's; thence, with 4 lines thereof, S. 35 W. 39 p's to a gum, S. 30° E. 160 p's to a hickory & w. oak, S. 45 E. 50 p's to w. o., S. 74 p's to a c. oak, with maple, &c., oak pointers, on the w. side of s'd ridge road; thence, with the meanders thereof, N. 67½ W. 22 p's, N. 64 W. 28 p's, N. 54 W. 23½ p's, N. 82 W. 21 p's, S. 61½ W. 32 p's, N. 78½ W. 16¾ p's, N. 34 W. 50 p's, N. 2¾ E. 48½ p's to a w. oak, N. 28¼ W. 39 p's, S. 83½ W. 31¾ p's, S. 48 W. 26 p's, (making in all 338½ p's,) to a hickory near the head of the right-hand fork of Reggins' Run; thence west 730 p's, crossing Flint Run, to a stone on line of land of Richard P. McReynolds; thence, therewith, N. 30 E. 237 p's, crossing said Flint Run again,
149 to a line of a tract of 186 a's, made for & patented to said C. Boggess, sr.; thence, therewith, S. 60 E. 150 p's to a hickory, N. 80 E. 62 p's to a beech, S. 70° E. 75 p's to a w. oak, N. 90 poles to a w. oak, N. 65 W. 56 p's to a w. oak on said line; thence N. 44 p's to a rock in the said Old Tyler ridge road, with a chestnut & dogwood pointers; thence, with the meanders of the s'd road, N. 86 E. 5½ p's, N. 27½° E. 12½ p's, N. 62 E. 26¼ p's, N. 41 E. 11 p's, N. 56½ E. 18 p's, N. 35 E. 23½ p's, east 80 poles, S. 62½ E. 16½ p's, (making in all 193¼ poles,) to the beginning, with its appurtenances:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said John R. Boggess and his heirs forever.

In witness whereof the said Joseph Johnson, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the

lesser seal of the said commonwealth to be affixed, at Richmond, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-four, and of the commonwealth the seventy-eighth.

[SEAL.] JOS. JOHNSON.

John R. Boggess hath title to the within-granted land.

S. H. PARKER,
Reg. L. Office.

150 And the defendant read in evidence receipts of the sheriff of the county of Doddridge to Caleb Bogges for the taxes on the said lands granted to him; which are in the words and figures following:

"Received of Caleb Boggess tax on 586 acres lands, $0 59, for 1847.

(Signed) "F. T. HARRISON, *D. S.*,
"*For W. F. Randolph, S. D. C.*"

"Received of Caleb Boggess tax on—

586 acres lands	$1 77
184 acres "	57
40 acres "	12
For 1848	$2 46

(Signed) "F. T. HARRISON, *D. S.*,
"*For W. F. Randolph, S. D. C.*"

"Received of Caleb Boggess the tax—

On 586 acres of lands for the year 1849	$1 77
Also on 184 acres	57
Also on 40 acres	12
	$2 46

(Signed) "C. J. STEUART, *D. S.*,
"*For C. Bonnell, S. D. C.*"

151 "Received of Caleb Boggess the tax—

On 586 acres of lands for the 1850	$1 77
Also 184 acres	57
Also 40 acres	12
" 158 "	48
" 200 "	60
	$3 54

(Signed) "C. J. STEUART, *D. S.*,
"*For C. Bonnell, S. D. C.*"

152 And the defendant introduced a witness who testified that an old man, who was dead, had told him that he was one of the chain-carriers who assisted in making the said surveys for Thomas Laidley, and that the surveyor, at the time of making the same, had made a corner thereof near the Rock Lick, at the point indicated by the red letter E on the plat made by the surveyor Sherwood.

And the defendant introduced other witnesses, who gave testimony tending to prove that the poplar tree in the forks of Ten Mile, at the point indicated by the letter A on the plat, was the eastern corner of the said survey No. 1 of 2,000 acres for Thomas Laidley, and a corner of the said survey of 927 acres, made for Richard Mason; and that the white oak, on a ridge between the right-hand fork of Ten Mile and Isaac's Creek, at the point indicated by the red letter I on the said plat, was the eastern of the said survey of 927 acres. And the defendant gave other evidence tending to locate the surveys aforesaid made for Thomas Laidley, Richard Mason, John Lyne, and Wil-
153 liam Barkley, as they are laid down and represented on the said plat made by the surveyor Sherwood.

And the parties agreed that the said Caleb Boggess died before the institution of this suit, leaving heirs; and that the defendant, claiming under the said heirs, and under the said John R. Boggess, had possession of that part of the land described in the declaration which is within the bounds of the grants to Caleb Boggess & the grant , John R. Boggess, before and at the commencement of this suit. The defendant then, in further support of the issue on his part joined, gave evidence tending to prove the identity of the said several surveys made for the said Thomas Laidley, and that the lands described in said surveys were correctly laid down as represented on said plat and report of the said Daniel Sherwood within the blue lines on said plat, and numbered from No. 1 to No. 30, inclusive, and No. 34, 35, & 36. And amongst other proofs, offered for that purpose, the said defendant offered to prove by a witness who lived, and had lived for many years, in the neighbor-
154 hood of said Thomas Laidley's survey No. 1, (as laid down on said Sherwood's plat,) that the poplar corner, represented on said plat as standing at red letter A, was, and had been for many years, known and reported in the neighborhood as the poplar beginning corner of said Laidley's survey No. 1. But the plaintiffs, by their attorney, objected to such proof of the reputation of said poplar corner as a corner of the said Laidley survey No. 1; and, the matter being referred to the court, the court sustained the said objection, and refused to let the defendants prove the reputation of the neighborhood as to the said poplar corner at the present day, unless such reputation was traditionary in its character, having passed down from those who were acquainted with the reputation of the tree at an early day to the present time, or that the information as to such reputation was derived from ancient sources, or from persons who had peculiar means of knowing what the reputattion of the tree was at an early day. But the court permitted the defendant to prove that the occupants of the Laidley
155 surveys No. 1 and *and* Mason's 927-acre tract, and those under whom they held, claimed the said poplar as the true corner to Laidley's survey No. 1 and Mason's 927-acre tract.

And to the opinion of the court sustaining said objection, and refusing to permit such evidence of repute as to the said corner at letter A, as offered, to go to the jury, the defendant, by his counsel, excepted, and prayed that his said exception might be signed, sealed, and made part of the record; which is done accordingly.

JOHN J. JACKSON, JR. [L. S.]

THOMPSON, &C., v. SCHUETTE. } No. 5.

Be it remembered that, upon the trial of this cause, after the evidence

had been given to the jury which is stated to have been so given in bills of exceptions Nos. 1, 2, 3, & 4, taken in this cause, and the deposition of Gerrit Smith and Asa Raymond, in the words and figures following:

156 Deposition of Gerrit Smith and Asa Raymond, who are residents of the village of Peterboro, in the county of Madison, in the State of New York, taken, on the part of the plaintiffs, before me, Joseph Mason, county judge of the county court of & for the county of Madison, in the State of New York, on the 12th day of December, A. D. 1864, at the village of Morrisville, in the said county of Madison.

GERRIT SMITH, having been by me first duly examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, deposes & says:

That he, the said Gerrit Smith, is a resident of the village of Peterboro, & State of New York, & has been for the last fifty years; and that he is a son of the late Peter Smith, of the said village & State; and that the following of the grantors of a certain deed of a certain tract of land of twenty thousand acres in West Virginia, in Doddridge County, to the Oberlin Institute, bearing date August 18, 1853, to wit, Peter Sken. Smith, Mary L. C. Biddle, John Cochran, Ellen Walter, Catharine Keneys, James W. Cochran, Gerrit Smith, & Cornelia S. C. Barclay, were, at the date & execution of said deed, the true &
157 only heirs at law of the said Peter Smith, of Peterboro, who died in the year 1837; and that the other grantors of the said deed, viz, Chapman Biddle, was the husband, & still is, of the aforesaid Mary; &, viz, William Keneys, was, & still is, the husband of the said Catharine; and, viz, W. L. Cochran, was the father of the said Mary, John, Ellen, Catharine, James, & Cornelia; and that afterwards, viz, in the year 1858, the said Peter Sken. Smith died, leaving his only son, Gerrit H. Smith, & his only daughter, Cornelia W. Smith, now Mrs. Baird, wife of Absalom Baird, his only heirs at law.

And this deponent further says that his father, the aforesaid Peter Smith, did, in the year 1815, purchase of Philo Murray the aforesaid twenty thousand acres of land now in Doddrige County, West Virginia; that his said father did from year to year pay the taxes thereon; and that he, his said father, had the aforesaid twenty thousand acres subdivided into farm lots by David Curtiss, a surveyor, to whom he paid for so doing four hundred twenty-eight dollars & forty cents.

158 And this deponent further says that, in the year 1819, his aforesaid father, Peter Smith, conveyed the aforesaid twenty thousand acres to him, the said deponent, & Daniel Cady; that, in 1836, the said Daniel Cady conveyed all his interest in the aforesaid twenty thousand acres to him, this deponent; that, in the year 1839, this deponent conveyed the whole of the said tract of land to the Oberlin Collegiate; and that for about twenty years he, this deponent, had owned, controlled, & managed the said tract; that Judge William Underwood, of Tyler County, West Virginia, was, down to the time of 1819, when the said Peter Smith conveyed the said tract to Daniel Cady & this deponent, the agent of the said Peter Smith to take charge & care of the said tract; & that, from that time, viz, 1819, he became the agent of this deponent for the same purpose, & continued to be such until in 1839, when he, this deponent, conveyed the tract as aforesaid to the Oberlin Collegiate Institute; that, from time to time, & generally from year to year, beginning with February 4th, 1820, he, this deponent,

159 furnished the said Judge Underwood with money to pay all taxes on the land, & that he, the said Judge Underwood, did, from time to time, furnish this deponent receipts for the said taxes, which receipts the said deponent did receive.

This deponent further says that the aforesaid tract of land was, to his best recollection, & as he fully believes, patented by the State of Virginia to Jabez Bacon; & that, from the date of the said deed from the said Peter Smith to the deponent & Daniel Cady, viz, in 1819, down to the time when he, the said deponent, viz, in 1839, conveyed the said tract to the said Oberlin Collegiate Institute, the aforesaid patents to Jabez Bacon, and all the original deeds of the said tract, were in the possession of this deponent; & that he then, viz, in 1839, delivered them all to the officers or agents of the said institute; & that he delivered along with them all the aforesaid receipts for taxes, and all the letters he had received from the said Judge W'm Underwood,

160 also the maps & surveys of the said tract, &, in short, all the papers belonging to himself or to his late father, Peter Smith, connected with or growing out of their ownership of the said tract of land.

This deponent further says that the said deed of his late father to himself & Daniel Cady was also delivered as aforesaid, & at the time aforesaid, to the said officers or agents of the Oberlin Collegiate Institute, & that he believes that the witness to the said deed is deceased.

GERRIT SMITH.

ASA RAYMOND, also of said Peterboro, having been by me first duly examined, cautioned, & sworn to testify the truth, the whole truth, and nothing but the truth, deposes & says:

That he has been a resident of the said village of Peterboro and its near vicinity for fifty-six years last past; that he was intimately acquainted with the late Peter Smith, of Peterboro aforesaid, in his lifetime, and also with all his children.

He, the said Peter Smith, died in the year 1837, leaving sons, Peter Sken. Smith and Gerrit Smith.

161 Peter Sken. Smith died in 1858, leaving a son, Gerrit H. Smith, and a daughter, Cornelia W., now the wife of Gen. A. Baird, his only heirs at law.

Cornelia, only daughter of said Peter Smith, and wife of Walter L. Cochran, deceased before her father, leaving her husband, the said Walter, & the following sons & daughters her only heirs at law, that is to say, John and James W. Cochran, Mary L. C., the wife of Chapman Biddle, Ellen Walter, Catherine Kemys, the wife of William Kemeys, and Cornelia S. C. Barclay; also Peter S. Cochran and Gertrude E. Cochran, both of whom, to wit, Peter S. and Gertrude E., died before the year 1853, neither of them having ever been married. And further this deponent saith not.

A. RAYMOND.

The defendant, in further support of the issue on his part joined, gave in evidence to the jury a deed from Peter Sken. Smith and others, heirs at law of Peter Smith, dec'd, to the Oberlin College, in these words:

162 This indenture, made the eighteenth day of August, in the year of our Lord one thousand eight hundred and fifty-three, between Peter Skenondogh Smith, Chapman Biddle, and Mary L. C. Biddle, of

the city of Philadelphia; and Walter L. Cochran, John Cochran, Ellen Walter, William Kemeys, and Catharine S. Kemeys, of the city of New York; and James W. Cochran, of the city of Chicago; and Garrit Smith and Cornelia S. Barcley, of the village of Peterboro, & State of New York, of the first part, and the board of trustees of the Oberlin College, formerly known as the Oberlin Collegiate Institute, of Oberlin, county of Loerain, and State of Ohio, of the second part, witnesseth that the said parties of the first part, for and in consideration of one dollar, money of account of United States, to them in hand paid, the receipt whereof is hereby confessed & acknowledged, have bargained, sold, remised, quitclaimed, and by these presents do bargain, sell, and quitclaim, unto the said parties of the second part, in their actual possession now being,

and to their heirs and assigns forever, all that tract of land in the
163 State of Virginia, and formerly in the counties of Tyler and Harrison, (but now in the county of Doddridge,) known as the Bacon tract, of twenty thousand acres, more or less, lying on the McElroy Creek, and subdivided by David Curtis; said tract is the same conveyed by Peter Smith, November 1st, 1869, to Daniel Cady and aforesaid Gerrit Smith, and by said Cady to aforesaid Gerrit Smith, May 2, 1836, and by aforesaid Gerrit Smith & wife to the board of trustees of Oberlin Institute June 5, 1839: Together with all and singular hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the *reservation* or reversions, remainder or remainders, rents, issues, and profits thereof, and all the estate, right, title and interest, claim and demand, whatsoever of the said parties of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances:

To have and to hold the said premises above described, with the appurtenances, to the said parties of the second part, their heirs and assigns, to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs & assigns forever; and it is expressly agreed that neither the said parties of the first part, nor their heirs, executors, administrators, shall, in any event or to any extent,

be liable in case the title to the said premises, or any part
164 thereof, shall fail.

In witness whereof the said parties of the first part have hereunto set their hands & seals the day and year first above written.

PETER SKEN. SMITH.	[L. S.]
CHAPMAN BIDDLE.	[L. S.]
MARY L. C. BIDDLE.	[L. S.]
W. L. COCHRAN.	[L. S.]
JOHN COCHRAN.	[L. S.]
ELLEN WALTERS.	[L. S.]
W'M KEMEYS.	[L. S.]
CATHERINE S. KEMEYS.	[L. S.]
JAMES W. COCHRAN.	[L. S.]
GERRIT SMITH.	[L. S.]
CORNELIA S. C. BARCLEY.	[L. S.]

Signed, sealed, and delivered in the presence of us to the
P. Sken. Smith.

JOH. H. FRICK.
F. GODSHALL.

STATE OF PENNSYLVANIA,
City of Philadelphia, to wit:

I, John H. Frick, a commissioner appointed by the governor of Virginia for the said State of Pennsylvania, certify that Peter Sken. Smith, whose name is signed to the writing above, bearing date on the eighteenth day of August, A. D. 1853, has acknowledged the same before me, in my State aforesaid.

Given under my hand and official seal this fifth day of September, A. D. 1853.

[OFFICIAL SEAL.] JOHN H. FRICK,
Com'r for Virginia, No. 75½ Dock street.

STATE OF NEW YORK, *Madison County, ss:*

On this 31st day of August, 1853, appeared before me Chapman Biddle, & Mary L. C. Biddle, his wife, Walter L. Cochran, John Cochran, Ellen Walter, W'm Kemeys, and Catherine S., his wife, Gerrit Smith, and Cornelia L. C. Barcley, who are to me known to be the persons who executed the within conveyance, and severally acknowledged that
166 they executed the same; and the said Mary L. C. Biddle, Catharine S. Kemeys, & Cornelia L. C. Barcley, on a private examination by me, separate and apart from their husbands, severally acknowledge that they executed the same without fear or compulsion of their husbands.

THOMAS F. PETRIE,
Justice of the Peace.

STATE OF NEW YORK,
Clerk's Office, Madison County, ss:

I, Lucius P. Clark, clerk of said county, do hereby certify that Tho's F. Petrie, esqr., whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a justice of the peace in and for said county, duly elected or appointed, and qualified and authorized by the laws of the said to take the same; and that I am well acquainted with his handwriting, and verily believe the
167 signature to the said certificate is genuine, and that said instrument is executed and acknowledged according to the laws of said State.

In testimony whereof I have hereunto set my hand and affixed my official seal the 31st day of August, 1853.

[OFFICIAL SEAL.] LUCIUS P. CLARK, *Clerk.*

STATE OF NEW YORK, *Madison County, ss:*

On this the 8th day of September, 1853, before me appeared James *M.* Cochran, who is to me known to be the person of that name who executed the within conveyance, & acknowledged that he executed the same.

THO'S F. PETRIE,
Justice of the Peace.

STATE OF NEW YORK,
Clerk's Office Madison County, ss:

I, Lucius P. Clark, clerk of said county, do hereby certify that Tho's F. Petrie, esq., whose name is subscribed to the certificate of the
168 proof of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment

a justice of the peace in and for said county, duly elected or appointed, and qualified and authorized by the laws of said State to take the same; and that I am well acquainted with his handwriting, and verily believe that the signature to the said certificate is genuine, and that said instrument is executed and acknowledged according to the laws of said State.

In testimony whereof I have hereunto set my hand and affixed my official seal the 9th day of September, 1853.

[OFFICIAL SEAL.] LUCIUS P. CLARK, *Clerk.*

DODDRIDGE COUNTY COURT,
Clerk's Office, November the 28th, 1853.

This deed, from Peter Sken. Smith and others to the Oberlin College, was this day presented in the clerk's office aforesaid, and admitted to record.

Teste: F. D. HICKMAN, *Clerk.*
Teste: T. K. KNIGHT,
Recorder Doddridge County.

169 Also a copy of the act of the general assembly of Ohio incorporating said college, in these words:

An act to incorporate the Oberlin Collegiate Institute.

SEC. 1. *Be it enacted by the general assembly of the State of Ohio*, That Henry Brown, John Keys, Eliphalet Redington, Joel Talcott, Addison Tracy, Jabez L. Burrell, Philip P. Stewart, Peter P. Pease, and John J. Shepherd, of the county of Lorain, and their associates and successors, be, and they are hereby, created a body politic and corporate, to be styled The Board of Trustees of the Oberlin Collegiate Institute, and by that name to remain in perpetual succession, with full power to sue and be sued; to plead and be impleaded; to acquire, hold, and convey property, real and personal; to have and use a common seal; to alter and renew the same at pleasure; to make and alter, from time to time, such by-laws as they may deem necessary for the govern-
170 ment of said institution, its officers, students, and servants: *Provided*, Such by-laws shall not be inconsistent with the Constitution and laws of the United States and of this State; also to have power to confer on those whom they may deem worthy such honors and degrees as are usually conferred in similar institutions.

SEC. 2. That the said institution shall remain where it is now located, in Russia, Lorain County, and shall afford instruction in the liberal arts and sciences; and the trustees may, as they shall find themselves able, and the public good shall require, elect additional departments for such other branches of education as they may think necessary or useful.

SEC. 3. That the board of trustees shall, from time to time, appoint a president, and other officers, and instructors, and also agents of the institution, as may be necessary; and shall have power to displace
171 and remove any or either of them for good and sufficient reasons; and also to increase the number of their board to twelve, exclusive of the president; fill vacancies which may occur by resignation, death, or otherwise in said board, or among said officers or agents, and prescibe and direct the course of study to be pursued in said institute and its departments.

SEC. 4. The president of the institution shall be ex officio a member of the board of trustees, and president of the same, and in his absence the board shall elect one of its members to preside for the time being, and, if any of said trustees shall be permanently appointed president of

said institution, his office as trustee shall be deemed vacant, and the board of trustees shall fill the same.

SEC. 5. Any seven of the twelve members of the board of trustees shall constitute a quorum to do business, and the board shall hold
172 their first annual meeting on the second Monday of March, eighteen hundred and thirty-four, at Oberlin, in the township of Russia, in Lorain County, and afterwards they shall meet on their own appointment; but, in cases of necessity, the president, with the advice of two trustees, may call a special meeting of the board, or any five members of the board may call such meeting by giving notice to each member at least seven days before the time of said meeting.

SEC. 6. The board of trustees shall faithfully apply all funds by them collected and received, according to their best judgment, in erecting suitable buildings, supporting the necessary officers, instructors, and agents, and in procuring books, maps, charts, and other apparatus necessary to the well-being and success of the institution: *Provided nevertheless*, That, in case any donations or bequests shall be made
173 for particular purposes not inconsistent with the designs of this institution, and the trustees shall accept and receive the same, every such donation or bequest shall be applied in conformity to the conditions or desires of the donor.

SEC. 7. The treasurer of the institution shall always, and all other agents when required, before entering on the duties of their appointments, give bonds for the security of the corporation and the public, in such penal sums and with such securities as the board of trustees shall approve; and all process against the corporation shall be by summons, and the service of the same shall be by leaving an attested copy thereof with the treasurer of the institution at least ten days before the return thereof.

SEC. 8. The legislature shall have a right to amend or repeal this act when they deem it necessary: *Provided*, That no fund or property
174 belonging to the said institution shall ever be by law appropriated to any other purpose than those named in this charter.

JOHN H. KEITH,
Speaker of the House of Representatives.
DAVID T. DISNEY,
Speaker of the Senate.

FEBRUARY 2, 1834.

THE STATE OF OHIO,
Office of the Secretary of State:

I, William Henry Smith, secretary of state of the State of Ohio, do hereby certify that the foregoing is a true copy of an act therein named, passed by the general assembly of the State of Ohio on the 2nd day of February, A. D. 1834, taken from the original rolls on file in this office.

In testimony whereof I have hereunto subscribed my name and affixed the great seal of the State of Ohio, at Columbus, the 8th day of August, A. D. 1867.

[SEAL.] W'M HENRY SMITH,
Secretary of State.

[Inter. rev., 5 cts., secretary of state, Aug. 8, 1867.]

175 Also a copy of an act of the legislature changing the name of said corporation, in these words:

An act to amend the act entitled "An act to incorporate the Oberlin Collegiate Institute."

SEC. 1. *Be it enacted by the general assembly of the State of Ohio*, That,

from and after the passage of this act, the name and title of the Oberlin Collegiate Institute, at Oberlin, Lorain County, be changed to the name of Oberlin College, subject to all the provisions and enactments of an act to incorporate the "Oberlin Collegiate Institute," passed February 2, 1834, and the acts amendatory thereto.

BENJAMIN F. LEITER,
Speaker of the House of Representatives.
CHARLES C. CONVERS,
Speaker of the Senate.

MARCH 21, 1850.

THE STATE OF OHIO,
Office of the Secretary of State:

176 I, William Henry Smith, secretary of state of the State of Ohio, do hereby certify that the foregoing is a true copy of an act therein named, passed by the general assembly of the State of Ohio on the 21st day of March, A. D. 1850, taken from the original rolls on file in this office.

In testimony whereof I have hereunto subscribed my name and affixed the great seal of the State of Ohio, at Columbus, the 8th day of August, A. D. 1867.

[SEAL.] W'M HENRY SMITH,
Secretary of State.

[Inter. rev., 5 cts., secretary of state, Aug. 8, 1867.]

And a deed from the Oberlin Collegiate Institute to Arthur Tappan, in the words and figures following:

Oberlin Collegiate Institute to Arthur Tappan.

Deed 9,637¾ acres, Harrison & Tyler.

This indenture, made the twenty-third (23d) day of October, in the year of our Lord one thousand eight hundred and forty-one, be-
177 tween the board of trustees of the Oberlin Collegiate Institute of Ohio, of the first part, and Arthur Tappan, of the city of New York, merchant, of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of four thousand six hundred and fourteen $\frac{82}{100}$ dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part on the first day of February last, the receipt whereof is hereby acknowledged, have remised, released, and quitclaimed, and by these presents do remise, release, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all that certain tract or parcel of land lying and being situated in Harrison and Tyler Counties, in the State of Virginia, viz: By David Curtis' survey and applotment, thirty-four entire lots, numbering from one to thirty-four, inclusive, and embracing, according to said survey, nine thousand six hundred thirty-seven and three-fourth acres of land, (9,637¾,) or the southwest
178 section of a tract of twenty thousand acres conveyed from Garret Smith & wife, of Peterboro, in the State of New York, to the said party of the *of the* first part, by deed bearing date the 5th day of June, 1839. For a further description of the location, boundaries, &c., of the said twenty-thousand-acre tract, reference may be had to a warranty deed of the same from Philo Murray to Peter Smith, of date 22nd April, 1815, and recorded in Tyler County records, book No. 1, page

118. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the remainder and remainders, reversion and reversions, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the above described premises, and every part and parcel thereof, with the appurtenances.

To have & to hold all and singular the above mentioned and
179 described premises, together with the appurtenances, unto the second part, his heirs and assigns, forever.

In witness whereof the said board of trustees, by Hamilton Hill, their attorney, have hereunto subscribed and affixed their corporate seal the day and year first above written.

HAMILTON HILL, [L. S.]
Attorney to the Board of Trustees of the Oberlin Collegiate Institute.

Witness, (the date having been first altered to the twenty-third day of October, 1841,)—
ALEXANDER GASTON.
JOHN GRANNIS.

THE STATE OF OHIO, *Lorain County, ss:*

Personally appeared before us, Alexander Gaston and John Grannis, two of the justices of the peace within and for said county, the board of trustees of the Oberlin Collegiate Institute, by their attorney,
180 Hamilton , who signed and sealed the within deed, and acknowledged the signing & sealing thereof to be their free act and deed.

Given under our hands this twenty third day of October, A. D. 1841.
ALEXANDER GASTON,
JOHN GRANNIS,
Justices of the Peace.

THE STATE OF OHIO, *Lorain County, ss:*

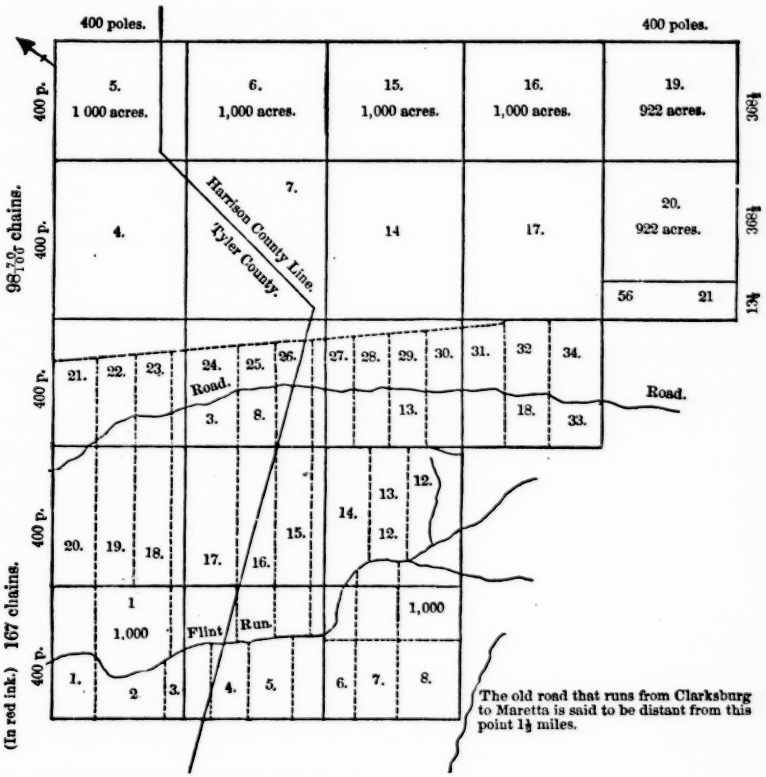
I, George H. Benham, clerk of the court of common pleas within and for the county of Lorain, State of Ohio, do hereby certify that Alexander Gaston and John Grannis, esquires, are acting justices of the peace within and for the county aforesaid, duly commissioned and qualified, and that their respective foregoing signatures, purporting to *his is*, are genuine.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Elyria, in said county, this 29th day of October, A. D. 1841.

[L. S.] G. H. BENHAM, *Clerk.*

181 The subjoined plat, in black lines, are *are* the 21 grants of State of Virginia to Jabez Bacon.

(In red ink:) The red lines and numbers are the new survey and subdivisions made by Cyrus Curtis in 1840, and are the 34 lots conveyed in this deed to Arthur Tappan.



The black lines in the copy are represented in the print thus: ————————

The red lines in the copy are represented in the print thus: - - - - - - - - - - - - - -

182 The 20 lots numbered from No. 1 to 20, inclusive, are now the property of John D. Clute, of the city of New York, and the other 14 lots, of William O'Connor, of Newark, Essex County, New Jersey, (No. 21 to 34.)

VIRGINIA:

Be it remembered that this deed, certificate, & plat were received, tax paid, and admitted to record in Harrison County court clerk's office Dec'r 2nd, 1844.

Attest: ELI MARSH, *C. H. C.*

A copy of the record.

Test: SIDNEY HAYMOND,
Recorder H. C.

But it is conceded that this deed does not cover any of the Liidley lands.

Also a deed from said Oberlin College to Uriah Thompson, in these words.

This indenture, made this fifth day of September, A. D. 1854, between the board of trustees of the Oberlin College, formerly known as the board of trustees of the Oberlin Collegiate Institute, in the State of Ohio, of the first part, and Uriah Thompson, of Oberlin, the
183 county of Lorain, & State aforesaid, of the second part, witnesseth that the party of the first part, for and in consideration of the sum of two thousand five hundred dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do give, grant, bargain, sell, & convey unto the said party of the second part all that tract of land in the State of Virginia formerly in the counties of Tyler & Harrison, but now in the county of Doddridge, viz: By David Curtis' survey and applotment, fifty-seven entire lots, numbering from thirty five to ninety-one, inclusive, & embracing, according to said survey, ten thousand eight hundred & twenty-seven & one-half acres, save an except so much of said land to which a claim is set up by the heirs of one Letherman, & *techicaly* called the Letherman claim, (or the northeast *setian*, excepting before excepted,) of a tract of twenty thousand acres, more or less, known as the Bacon tract, lying on the McElroy Creek, & subdivided by D. Curtis aforesaid; said
184 tract is the sames as conveyed by Peter Smith, Nov. 1st, 1819, to Daniel Cady & Garret Smith, & by said Cady to aforesaid Gerrit Smith, May 2, 1836, & by aforesaid Gerrit Smith & wife to the said board of trustees, or party of the first part, June 5, 1839. Reference may also be had to a deed of the same tract from Philo Murray to Peter Smith, of date April 22nd, 1815, & *received* in Tyler County records, book No. 1, (page 118.) Together with all and singular the hereditaments & appurtenances thereunto belonging or in any wise appertaining, & the reversion or reversions, remainder or remainders, rents, issues, & profits thereof, & all the estate, right, title, interest, claim, & demand whatsoever of the said party of the first part of, in, and to the above-described premises, & every part or parcel thereof, (except as before excepted,) with the appurtenances:

To have & to hold the above-granted & bargained premises, (except as before excepted,) with the appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns,
185 forever, to his own proper use & behoof. And the said party of the first part do, for themselves & their successors in office, covenant with the said party of the second part, his heirs and assigns, that, at & until the ensealing of these presents, they were well seized of the premises as a good & undefeasible title in fee-simple, & have good right to bargain & sell the same in manner & form as before written, & that the same is free from all incumbrances whatsoever; and, furthermore, the said party of the first part do by these presents bind themselves, and their successors in office forever to warrant and defend the above granted & bargained premises to the said party of the second part against all lawful claims & demands, except the claim set up by the heirs of Letherman as before mentioned.

In witness whereof the said party of the first part have, by their secretary & treasurer, he being duly authorized therefore, subscribed affixed their *corporal* seal the day and year *and year* first above
186 written.

HAMILTON HILL, [SEAL.]
Sec., Tra.

Signed, sealed, & delivered in the presence of—
JAMES MONROE.
R. H. ALLEN.

THE STATE OF OHIO, *Lorain County, ss:*

Personally appeared before me the board of trustees of the Oberlin College, by their secretary and treasurer, Hamilton Hill, who acknowledged that he signed & sealed the foregoing instrument as the free act & deed of the said board.

Given under my hand this fifth day of September, A. D. 1854.

R. H. ALLEN,
Justice of the Peace.

THE STATE OF OHIO, *Lorain County, ss:*

I, Landon Road, clerk of the court of common pleas within and for said county, do hereby certify that R. H. Allen, esqr., by whom
187 the foregoing acknowledgment was taken, at the time of the taking of the same an acting justice of the peace in and for said county, and duly commissioned and qualified, and, as such officer, is duly authorized by the laws of Ohio to administer oaths for general purposes, and to take the acknowledgment of deeds and other instruments of writing under seal, and that I am acquainted with his signature, and verily believe the above to be genuine; and further, that said court is a court of records.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Elyra, this 7 day of September, A. D. 1854.

[OFFICIAL SEAL.] L. ROAD, *Clerk.*

DODDRIDGE COUNTY COURT,
Clerk's Office, January 9th, 1855.

This deed, from the board of trustees of Oberlin College, by Hamilton Hill, sect. &c., to Uriah Thompson, was this day presented in the
188 clerk's office aforesaid, and admitted to record.

Teste: F. D. HICKMAN, *Clerk.*
Teste: T. K. KNIGHT,
Recorder Doddridge County.

The defendant then offered to read in evidence to the jury a deed from T. K. Knight, recorder of the county of Doddridge, to J. S. Hoffman, in these words:

This deed, made this 26th day of March, in the year 1866, between Taliaferro Knight, recorder of the county of Doddridge, of the one part, and John S. Hoffman, of the other part:

Whereas a tract of land containing 10,827½ acres, on the McElroy, in the year 1857, was entered on the land-book of the commissioner of the revenue for the county of Doddridge aforesaid, for the said year 1857, in the name of Uriah Thompson, who had the estate therein in fee, and the said Uriah Thompson was assessed on the said book for the said year 1857 with forty-three dollars and thirty-one cents tax on said land for the said year 1857, as appears by the said land-book, with the

proper oath at the foot thereof made and subscribed, and the
189 proper certificates annexed, all as directed by law:

And whereas the said tract of land was returned, in the name of the said Uriah Thompson, delinquent for the non-payment of the tax aforesaid thereon for the said year 1857, as appears by the list of lands and lots within the said county of Doddridge delinquent for the non-payment of taxes thereon for the said year 1857, returned to the court of the said county, by the same acted on and disposed of, all as directed by law:

And whereas the said tract of land, containing 10,827½ acres on McElroy, was, on the 23d day of October, in the year 1860, by Charles C. Davis, sheriff of the said county of Doddridge, sold in the name of the said Uriah Thompson for the tax aforesaid due thereon, with interest, making fifty dollars and forty-six cents, and commission thereon, making fifty-two dollars and eighty-one cents, the amount of purchase-money, and purchased by John S. Hoffman, which said facts appear by the list of the real estate within the said county of Doddridge,
190 sold in the month of October, in the year 1860, for the non-payment of taxes thereon for the years 1855, 1856, 1857, 1858, and 1859, which said list having the proper oath subjoined thereto, subscribed and taken by the said Charles C. Davis, sheriff of the said county of Doddridge, before a justice, with his certificate of the said oath attached thereto, all as directed by law, was, on the 24th day of December, in the year 1860, returned to the said court, and a copy thereof was by the said court then ordered to be certified to the auditor of public accounts:

And whereas a report specifying the metes and bounds of the said land, and the names of the owners of the adjoining tracts, and giving such further description of the said land as identifies the same, was made as directed by law by Williams Maxwell, surveyor of the said county of Doddridge, to the judge of the circuit court of said county, in vacation, on the 24th day of March, in the year 1866, and by the said judge
191 then order to be recorded, which was done:

Now, this deed witnesseth that, in consideration of the premises, the said Taliaferro K. Knight, recorder of the said county, grants and conveys unto the said John S. Hoffman the said tract of land, which, as appears by the said report, is situated in the said county of Doddridge, on the McElroy Fork of Middle Island Creek, Robinson's Fork, Big Battle Fork, Little Battle Fork thereof, and Reggins' Run, waters of McElroy Fork, adjoins lands of Joshua Allen, and Israel Allen's heirs, and Charles S. Lewis, and is bounded as follows: Beginning at a chestnut oak, the northern corner of lot No. 5 of a connection of tracts of land granted by the Commonwealth of Virginia to Jabez Bacon, and running thence S. 45° E. 2,000 poles to a maple, the eastern corner of lot No. 19 of the said connection; thence S. 45° W. 800 poles to a chestnut, the southern corner of lot No. 21 of the said connection; thence N. 45 W. 400 poles to a beech, the western corner of the
192 last-mentioned lot; thence, with the lines of lands described in a deed from the clerk of the county court of Doddridge County to Charles S. Lewis, N. 54° W. 1,156 poles to a line on the northwestern side of lot No. 3 of the said connection; and thence N. 45 E. 960 poles to the beginning—the same land described in a deed from the Oberlin Collegiate Institute to Uriah Thompson, dated the 5th day of September, 1854.

Witness the following signature and seal.

TALIAFERRO K. KNIGHT. [SEAL.]

[Inter. rev., 50 cts., T. K. K., March 26, 1866.]

STATE OF WEST VIRGINIA,
Doddridge County, to wit:

I, B. H. Maulsby, a justice of Doddridge County, do hereby certify that T. K. Knight, whose name is signed to the foregoing writing bearing date on the 26th day of March, A. D. 1866, this day personally appeared before me and acknowledged the same.

Given under my hand this 27th day of March, A. D. 1866.

B. H. MAULSBY, *Justice.*

193 STATE OF WEST VIRGINIA, DODDRIDGE COUNTY,
Recorder's Office, March the 27th, 1866.

The foregoing deed from T. K. Knight, recorder of Doddridge County, to John S. Hoffman, was this day presented in the recorder's office aforesaid, and admitted to record.

Teste: T. K. KNIGHT, *Recorder.*

And offered to accompany said deed with evidence that said land therein described had lain wholly within the said county of Doddridge since its formation in 1845; that it had been assessed with taxes on the books of said county for the year in said deed specified, and had been returned as delinquent for the non-payment of such taxes by the proper officer; that the person by whom the said land was sold was the sheriff of the said county of Doddridge, duly commissioned, qualified, and sworn, and also with proof that the said T. K. Knight, by whom said deed purported to have been made, was at the time of the
194 execution thereof the recorder of said county of Doddridge, duly elected, qualified, and acting as such; but to the admissibility of said deed as evidence to the jury on the trial of this issue, accompanied by the proofs aforesaid, the plaintiffs objected, and the matter being referred to the court, the court sustained the objection, and refused to permit the said deed to be read in evidence to the jury with the accompanying proofs as aforesaid; and to the opinion of the court thus excluding said deed as evidence from the jury, the defendant by his attorney excepted, and prays that this his exception might be signed, sealed, and made a part of the record; which is done accordingly.

JOHN J. JACKSON, JR. [SEAL.]

Bill of exceptions marked No. 6 is as follows:

URIAH THOMPSON & OTHERS
vs.
CHARLES SHUTTE.

195 Be it remembered that upon the trial of this cause the plaintiffs read in evidence the twenty one grants from the Commonwealth of Virginia to Jabez Bacon, eighteen of them for 1,000 acres each, two for 922 acres each, and one for 156 acres, adjoining them in the county of Ohio, on the waters of Middle Island, dated in the month of October, 1797, set forth in the defendant's 2nd bill of exceptions.

And the plaintiff read in evidence the report of Daniel Sherwood, with the plat thereto annexed, which is set forth in the defendant's 4th bill of exceptions.

And the plaintiff read a part of the deposition of Nathaniel A. Bacon, which tended to prove that Nathaniel Bacon was a son of Jabez Bacon, and that witness was the son of said Nathaniel Bacon; that said Jabez

Bacon died in the year 1806, which said part of said deposition is set forth in the defendant's 2nd bill of exceptions in this cause.

196 And the plaintiff read the deposition of Hamilton Hill, subject to the qualification stated in the defendant's said 2nd bill of exceptions. And the plaintiff read the deposition of George N. Allen, which is set forth in the defendant's said 2nd bill of exceptions.

And the plaintiff introduced F. D. Parish, who testified as follows: That he acted as trustee for the Oberlin College; has acted as agent for the plaintiff, Thompson; has made diligent search for deeds which are claimed to have existed, under which plaintiffs claim to have derived title to the lands granted to Bacon, but could not find them. He obtained the twenty-one grants *read* from William Underwood. Jabez Bacon had as many as eight children, of whom Nathaniel was one. The heirs of said Jabez Bacon are very numerous; that he has, since the institution of this suit, conversed and corresponded with several of them, and knows that these do not set up any claim to this land.

197 And the plaintiff read in evidence a copy of a deed dated the 3d day of May, 1815, from Nathaniel Bacon to Philo Murray for 20,000 acres of land; and a copy of a deed dated the 22d day of April, in the year 1815, from Philo Murray to Peter S. Smith for 20,000 acres of land; which said copies are set forth respectively in the defendant's 2nd and 3d bills of exceptions.

And the plaintiff read the deposition of William Underwood, subject to the qualification that no part thereof was admitted to prove that Peter Smith, or Gerrit Smith, or the Oberlin Collegiate Institute, or the Oberlin College, or Uriah Thompson, had in fact title to the land, but for any other legal purpose; in which said deposition the witness testified as follows:

That in 1817 David Curtis, of New York, was sent out by Peter Smith to see about the tract of land granted to Jabez Bacon

198 by twenty-one patents, containing 20,000 acres. In 1818 Curtis came out again, and he and witness surveyed the land and laid it off into lots. In 1817 witness became the agent of Peter Smith to see to the payment of taxes on, and management of, the 20,000 acres of land patented to Jabez Bacon; that he paid the taxes until Gerrit Smith became the owner of the land, which was about 1820. Gerrit Smith sent him money to pay any back taxes that might be charged on the land, and he wrote to a member of the legislature at Richmond, to ascertain whether there were any. He does not now remember whether there were any, but thinks that if there had been they were paid. While he was agent for Peter Smith, he paid the taxes on the land as they became due. When Gerrit Smith and his brother-in-law disposed of the land to the Oberlin Collegeiate Institute, witness continued as the agent of the latter to see to the payment of the taxes.

When the Oberlin Collegiate Institute disposed of the land to

199 the plaintiff, Uriah Thompson, which was in 1854, Samuel McMillan became the agent. From the time the witness became the agent, in 1817 down to 1854, the taxes were all regularly paid on the said land; he paid them all to the sheriff of Tyler County; he paid the taxes for each year, and did not let the land become delinquent. It was returned delinquent by the sheriff of Tyler County for one or more years between, he thinks, 1840 and 1845, although the taxes had been paid, and afterwards, on the day of sale, he redeemed it; he generally sent the tax receipts to the owners of the land annually. The receipts for the land taxes paid by him were sent to the Oberlin Collegiate Institute, or to whom the land was taxed. The Oberlin Collegiate Insti-

tute sold to Frederick Cunningham 10,827½ acres of the said land, and they were charged to Cunningham on the books, and he paid the taxes for Cunningham, and has the receipts, which are filed with the deposition. In 1826 the witness, as agent for Gerrit Smith, placed as
200 tenant on the land Adam Ash; in 1829, Elias Williams; in 1833, Thomas Williams; in 1834, Gideon Roberts; in 1835, Edward Thomas, and in 1836, James Weekly. Witness went on the land and required the tenants to pay rent in order to pay taxes. There had been some one on the lands since 1826 as tenants, first of Gerrit Smith, then of the Oberlin Collegiate Institute, and down to the present owner of the land; these several tenants were all in possession of parts and parcels of the land embraced in the several patents to Jabez Bacon. There were no defined or limited boundaries to their possession; they were to go on the land & make such improvement as suited them.

Which said deposition is set forth in the defendant's 1st bill of exceptions.

And the plaintiff introduced the following witnesses, who testified as follows:

STEPHEN ASH:

That his father, Adam Ash, made an improvement on Flint Run, near the mouth of East Run, in the boundaries of grant No. 12 to Jabez Bacon. Witness is 39 years old. As far back as he can recollect
201 he heard of his father paying rent to Underwood; has seen Underwood at his father's. His father claimed no certain boundary as tenant, but about 18 years ago purchased 361 acres, including the improvement. After his father's death, witness purchased the land his father had purchased, and claims no more. His father cleared and enclosed about 40 acres. He and members of his family have had possession of the place ever since witness can recollect. Witness lives on the land now under the Bacon title.

THOMAS WILLIAMS:

That Elias Williams, his father, moved on the Bacon land in 1832. Does not know whether he claimed under his own patent or whether he went there under Underwood; he went on Flint Run, near the mouth of Ned's Run, about 250 yards from the line between the counties of Harrison & Tyler, within the boundaries of grant No. 10 of the said land granted to Bacon. After he had been there some time, he claimed under Underwood. He claimed no particular boundary; don't
202 think he claimed as much as one lot. He claimed under Bacon title. He died about 1845; he died there. Witness' mother lived there about one year after he died; after that no one had possession till McMillan came, perhaps two years afterwards. McMillan has lived there ever since. Witness bought an improvement of a man named Kinney, and went on it on Israel's Fork of Flint Run, about a mile above where his father lived, in the bounds of said grant No. 10 to said Bacon; went there in 1833. Afterwards witness paid rent to Underwood, and afterwards leased of Clute.

RICHARD ROBERTS:

That about 27 years ago Underwood gave him possession, and he went on land on Reggins' Run, in the forks within the boundaries of grant No. 10 to Bacon, and built a cabin and staid about two months. Thinks Underwood was agent for Smith. After McMillan became agent

for Clute, witness' son purchased from him, and witness went on
203 the land to live with his son. This was not more than five years ago. His son lives there now.

DANIEL SHERWOOD:

That James Weekly lived on Reggins' Run, within the boundaries of Bacon's said grant No. 8. The tenants on the land granted to Bacon had cabins & small improvements around them. Within the boundaries of the said grants to said Bacon there are persons who have improvements and possession adverse to the Bacon. There are a great many persons in possession of the northern part of the Bacon land claimed adversely to the Bacon title, who have old improvements, some of them 40 years old, within the boundaries of the Leatherman land, represented on the plat by the green shade. But plaintiffs do not claim this part of the land covered by the Leatherman surveys.

JOHN J. ASH:

That Gideon Roberts lived on Reggins' Run, within the boundaries of grant No. 3 to Jabez Bacon, and near the line on the northwest side of the survey No. 25, made for Thomas Laidley, near where the line on that side of that survey crosses the run, and that the greater part
204 of his improvement was within the boundaries of the said survey made for Thomas Laidley, which was granted to John Reed; that the said Roberts had a cabin and about 20 acres improved and enclosed. Witness is 38 years old. Roberts went there under Underwood about 30 years ago; he remained there about 17 years, and then left. Afterwards a school was kept in the house he left. After that Levi Roberts had the place about two years, and paid rent to Underwood. At the expiration of that time a brother of the witness took it, and had it two years, and paid rent to Underwood. At the expiration of that time, about 11 years ago, the witness purchased 215 acres of McMillan, as agent of the plaintiff, Thompson, including the land which had been occupied by said Gideon Roberts, and he has been in possession thereof ever since. He has improved about 10 acres, so that there is now about 30 acres improved and enclosed.

SAMUEL MCMILLAN:

That in 1847, he purchased from Clute and moved on Flint
205 Run, and has been there ever since within the boundaries of the said Bacon grant No. 12; he was for several years agent for Clute; in 1854 he became the agent for said Uriah Thompson, and has continued to act as such and look after the land till the present time; the part he purchased from Clute is separate from the Thompson land; he never saw any of the Bacons on the land, or in that country; said Thompson did not claim that part of the grants which covered the Leatherman land, but directed witness to have that part stricken from the books of the commissioner of the revenue, and he did it when he was commissioner, in 1855 or 1856.

The plaintiffs read the deposition of Gerrit Smith, with the qualification that no part thereof was admitted to prove that Philo Murray conveyed any land to Peter Smith, or that Peter Smith conveyed any land to Gerrit Smith & Daniel Cady, or either of them, or that the said Cady conveyed any land or interest in land to the witness, or that he conveyed any land to the Oberlin Collegiate Institute, or that either of the said parties owned the said land, but
206 was admitted for any other legal purpose, in which said deposition the said witness testifies among other matters as follows:

That William Underwood was agent for Peter Smith to take charge and care of the said lands before 1819; that from that time he became the agent of the witness for such purpose until 1839, when witness conveyed the land to the Oberlin Collegiate Institute; that in the year 1819 Peter Smith conveyed the tract of 20,000 acres of land to witness; that before that time William Underwood was the agent of Peter Smith, and from that time was the agent of the witness Gerrit Smith to take charge and care of the land until 1839, when witness conveyed the land to the Oberlin Collegiate Institute; that Peter Smith died in 1837, leaving Peter S. Smith and others whose names are mentioned, who are grantors in a deed from Peter S. Smith and others to the Oberlin College, dated on the 18th of August, 1853.

And the plaintiff read the deposition of Asa Raymond, which said deposition of Gerrit Smith and Asa Raymond are set forth in the
207 defendant's 5th bill of exceptions.

And the plaintiff and defendant both gave evidence tending to prove that from the formation of the county of Tyler, in the year 1814, a part of the said land designated in the said grants to Jabez Bacon was in the county of Tyler, and that those parts described in the declaration were in the county of Harrison till the formation of the county of Doddridge, and from that time, in the year 1845, the whole thereof was in the said county of Doddridge.

And the defendant read certificates of the auditor of public accounts of Virginia, by which the said auditor certified, among other things, that a tract of land containing 20,000 acres on the waters of Middle Island, was returned delinquent in the county of Ohio, in each of the years 1799, 1800, 1812, 1813, & 1814, in the name of Jabez Bacon, for the non-payment of taxes thereon for those years respectively: for the year 1799, $4 86 cents; for each of the years 1800 & 1812, 4 80 cents; for the year 1813, $6 40 cents; and for the year 1814, $8 50 cents,
208 making $29 36 cents; and that no part of the said taxes was ever paid, which said certificate is set forth in the defendant's bill of exceptions No. 4. And the land-books of the commissioner of the revenue for the county of Harrison, and another certificate of the said auditor of public accounts, by which together it appeared that no tract of 1,000 acres of land or 20,000 acres of land was ever entered in either of the said land-books; which said certificate is set forth in the defendant's said 4th bill of exceptions.

And the defendant read in evidence five grants from the Commonwealth of Virginia to John Reed, numbered respectively, 18, 25, 26, 27, & 28, each for 2,000 acres of land in the county of Harrison, dated in the month of January, 1787, which are set forth in the said defendant's said 4th bill of exceptions. And the parties agreed that the tracts of land aforesaid granted to John Reed never were, nor was either of them, entered on any land-book of any commissioner of the revenue, and that the said lands were therefore forfeited to, and vested in, the Com-
209 monwealth of Virginia in the year 1836.

And the defendant read in evidence copies of six receipts of the treasurer of Virginia, filed in the auditor's office of Virginia, with the certificate of the auditor annexed, which are set forth in the defendant's said 4th bill of exceptions.

And the defendant read an abstract from the land-books of the commissioner of the revenue for the county of Tyler, by which it appears that a tract of 20,000 acres of land on the waters of Middle Island was entered and assessed with taxes on land-books of the commissioner of the

revenue for the county of Tyler for the years 1815, 1816, & 1817, in the name of Jabez Bacon; and a tract of 20,000 acres described first as on waters of Middle Island, and afterwards on McElroy Fork, was entered and charged on such books for the year 1818, and thence to and including the year 1840, in the name of Peter Smith, and for the years 1842, 1843, & 1844, in the Oberlin Collegiate Institute; and an ab-
210 stract from the lists of land delinquent for the non-payment of taxes for the said county of Tyler, whereby it appears that, in the year 1815, a tract of 20,000 acres of land on Middle Island was delinquent in the name of Jabez Bacon; and that, in the year 1826, the said tract of 20,000 acres of land was delinquent in the name of Peter Smith for the non-payment of the taxes thereon for that year, which was $8 00; and that, in the year 1841, a tract of 20,000 acres on McElroy Fork was returned delinquent in the name of the Oberlin Collegiate Institute for the tax of that year, and the recorder of the said county certified that he had searched the lists of lands in the said county delinquent for the non-payment of taxes, and that the said abstract is a true one of what appears in the name of Jabez Bacon, Peter Smith, and the Oberlin Collegiate Institute; and a certificate of the recorder of Doddridge County, whereby it appears, among other things, that a tract of 10,000 acres of land described as on Flint Run is entered on the land-books of the
211 commissioner of the revenue for the county of Doddrige for the years 1846 & 1847; that a tract of 10,827½ acres was entered and assessed, on such books for the years 1848 and thence to and including the year 1854, in the name of Frederick Cunningham; and in the year 1856, and subsequently, a tract of 10,827½ acres was entered and assessed on such books in the name of Uriah Thompson, which said abstracts and certificates were filed by the plaintiffs, and are set forth in the defendant's 4th bill of exceptions.

And the plaintiff proved by a proper receipt that the taxes charged in 1841 to the Oberlin Collegiate Institute were paid in the year 1845 by William Underwood.

And the defendant read in evidence three grants from the Commonwealth of Virginia to Caleb Boggess, one for 586 acres, dated the 13th day of November, 1846, another for 40 acres, dated the 20th day of September, 1847, and the other for 158 acres, dated the 31st day of December, 1849, and a grant from the Commonwealth of Virginia to John R. Boggess for 5,200 acres of land adjoining the last-mentioned three tracts,
212 dated the 1st day of July, in the year 1854; which said four grants are set forth in the defendant's said 4th bill of exceptions.

And the defendant read in evidence receipts for the taxes on the said land described in the said grants to Caleb Boggess, whereby it appears that in the years 1847, 1848, 1849, & 1850, he paid the taxes charged on the said land described in the said grants respectively which had issued to him as aforesaid; which said receipts are set forth in the defendant's said 4th bill of exceptions.

And the parties agreed that Caleb Boggess died before the institution of this suit, leaving heirs; and that the said defendant, claiming under the said heirs and under the said John R. Boggess. was in possession of that part of the land described in the declaration, which is within the boundaries of the grants to Caleb Boggess and the grant to John R. Boggess, before and at the commencement of this suit.

And the defendant read a copy of an act of the general assembly of the State of Ohio, on the 2d day of February, 1834, to incorporate the Oberlin Collegiate Institute, and a copy of an act of the said general assembly

213 passed the 21st day of March, 1850, to amend that act, changing the name of the Oberlin Collegiate Institute to the Oberlin College; which said acts are set forth in the defendant's said 4th bill of exceptions.

And the defendant read a copy of a deed dated the 8th day of August, 1853, from Peter S. Smith and others to the Oberlin College for 20,000 acres of land, and a copy of a deed dated the 25th day of October, 1841, from the Oberlin College to Arthur Tappan, for 9,637¾ acres of said land, and a copy of a deed dated the 5th day of September, in the year 1854, from the Oberlin College to Uriah Thompson, for 10,827½ acres of land, the residue of the said land described in the said grants to the said Jabez Bacon, except that part known as the Leatherman lands; which said three deeds are set forth in the *plaintiff's* 5th bill of exceptions.

The plaintiffs did not, however, read in evidence any other grant or deed than those hereinbefore mentioned, or any will, or give any
214 evidence of any descent, or possession, or payment of taxes, or evidence in any way tending to prove that any or either of the plaintiffs had acquired title to the land described in the declaration, other than the evidence set forth in the defendant's former bills of exceptions, and referred to as part hereof, and in this bill.

And the counsel having argued the case, the jury retired to consider of their verdict; and afterwards, before they had agreed, came into court, and presented to the court a written request that the court would instruct the jury as to certain matters of law.

And thereupon the court instructed the jury as to such matters of law as follows:

1st. That if the jury believe that the lands in controversy are within the grants to Jabez Bacon, and that they were delinquent for the non-payment of taxes prior to 1815, and that the amount for which they were so delinquent exceeded ten dollars, and were not paid or
215 released by law, then, under the act of 1831, they became forfeited, and the forfeiture was absolute in October, 1834, and all the right and title of the patentee Bacon vested in the commonwealth.

2d. And if they further believe that the plaintiffs, or those under whom they claim, took charge of the lands within the grants to Jabez Bacon in 1817, and exercised authority over them, and that in 1826 they took actual possession of the same, and have so continued in possession of the same up to the institution of this suit, claiming them as their own under the Bacon grants and the deed to Peter Smith, paying all taxes duly assessed and charged against them on such lands, and all taxes that ought to have been assessed and charged against them, then the Bacon lands (*if*) forfeited as aforesaid to the commonwealth, became and were actually vested in the plaintiffs, or those under whom they claim, in October, 1834, under the act of 1832; but if the taxes
216 assessed and due upon the lands against Smith do not amount to ten dollars, they are released by the act of 1832.

3d. That if the jury believe from the evidence that the land in controversy was covered by grants to John Reed as well as by grants to Jabez Bacon, and that the grants to Reed were the oldest, and that under the act of 1835 they became forfeited for non-entry, and that said forfeiture was absolute in November, 1836, that the plaintiffs were the bona-fide occupants of the land in controversy, or any part thereof, claiming title to the same, and that they have paid all taxes duly assessed, charged, or chargeable against them from the time when they acquired their title thereto; that the lands in controversy so forfeited

in the name of John Reed, under the act of 1835, became transferred and absolutely vested in the plaintiffs, or those under whom they claim, and that if the taxes charged against Peter Smith on the Bacon
217 lands before 1832 were delinquent for less than ten dollars, they were released by law.

And the defendant, by his counsel, excepted to the said second instruction as matter of law; and the defendant, by his counsel, excepted to the said third instruction as matter of law; and the defendant prays that this his bill of several exceptions be signed, sealed, and made a part of the record; and the evidence set forth in the defendant's other bills of exceptions is by the court made a part of this, and therewith his bill is so signed, sealed, and made a part of the record.

JOHN J. JACKSON, JR. [SEAL.]

The United States of America to Uriah Thompson, greeting:

You are hereby cited and admonished to be and appear at the Supreme court of the United States, to be holden at Washington
218 on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of West Virginia, wherein Charles Shutte is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jackson, jr., judge of the district court of the United States for the district of West Virginia, this 30th day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

JOHN J. JACKSON, JR.

UNITED STATES OF AMERICA,
District of West Virginia:

On this 28th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, personally appeared Jasper Y. Moore before me, the subscriber, a commissioner appointed by the district court of the United States for the district of West Virginia to take bail
219 and affidavits, and makes oath that he this day delivered a true copy of the within citation to Benjamin H. Smith, attorney for the plaintiff, Uriah Thompson, in the district court of the United States for the district of West Virginia, and defendant in error, as appears by the docket of the said district court, on which the name of the said Benjamin H. Smith appears as attorney for the said Uriah Thompson, and as is known to him, the said Moore, personally.

JASPER Y. MOORE.

Subscribed and sworn to before me, the said commissioner, on the day and year above mentioned.

WM. H. HOGEMAN,
U. S. Commissioner.

Know all men by these presents that we, Charles Shutte and Mortimer C. Boggess, are held and firmly bound unto Uriah Thompson in the sum of one thousand dollars; to the true payment of which we
220 bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with

our seals, and dated this 30th day of March, in the year of our Lord 1869.

The condition of the above obligation is such, that whereas the above-bound Charles Shutte now obtains from the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, a writ of error to a judgment of the said court, rendered on the 29th day of March, in the year of our Lord 1869, in favor of the said Uriah Thompson, against the said Charles Shutte, and the said judge now signs a citation upon the said writ:

Now, if the said Charles Shutte shall prosecute the said writ to effect, and answer all damages and costs if he fail to make his plea good, then this obligation to be void; otherwise to remain in full force.

CHARLES SCHUTTE. [SEAL.]
MORTIMER C. BOGGESS. [SEAL.]

Taken, approved, and deemed sufficient by me, the judge in the foregoing bond mentioned, on the day of the date thereof, at the time of my signing the citation therein mentioned.

J. J. JACKSON, JR.,
Judge D. C. U. S. D. W. Va.

221 UNITED STATES OF AMERICA,
District of West Virginia, sct:

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do certify that the foregoing is a true transcript of the records, and of all proceedings now remaining on file in my office, in said cause of Uriah Thompson et al. against Charles Shutte, in ejectment, lately depending in said district court of the United States for the district of West Virginia, at Clarksburg.

In testimony whereof I have hereto set my hand and the seal of said district court, at Clarksburg, this 16th day of November, A. D. 1869, and in the 94th year of the independence of the United States of America.

[SEAL.]

JASPER Y. MOORE,
Clerk D. C. U. S. for D. W. V.

Fee for record, &c., $83 18.

(Indorsement on cover:) No. 453. Charles Shutte, plaintiff in error, vs. Uriah Thompson et al. West Virginia. D. C. U. S.
Filed 7th May, 1870.

a true

Supreme Court of the United States.

DECEMBER TERM, 1871.—No. 41.

CHARLES SHUTTEE, Defendant in Ejectment, Plaintiff in Error,

vs.

URIAH THOMPSON, Plaintiff in the Action, Defendant in Error.

ARGUMENT OF JOHN S. HOFFMAN,

Counsel for the Plaintiff in Error.

McGill & Witherow, Printers 1107 E street, Washington, D.C.

Supreme Court of the United States.

No. 41.

CHARLES SHUTTE, Defendant in ejectment, Plaintiff in Error,

vs.

URIAH THOMPSON, a Plaintiff in the action, Defendant in Error.

ARGUMENT.

The deposition objected to was improperly taken, and should not have been permitted to be read.

The plaintiffs in the action of ejectment, one of whom is the defendant in error, on the trial, offered to read in evidence the deposition of William Underwood, that appeared to have been taken before a Justice of a township in one of the counties of West Virginia, in the year 1864. The Defendant in the action, the Plaintiff in error, objected to the reading of the deposition, because it was not taken by an officer authorized to take it; and because it was not certified or proven that the witness was carefully cautioned and sworn to testify the whole truth; and for other reasons, among which were, that the Plaintiff did not show, and the officer before whom the deposition was taken did not ascertain or certify, whether there was any, and if so what, reason there was for taking the deposition; and it did not appear in the certificate or on the offer to read the deposition, that it was reduced to writing by the officer, or the deponent in his presence. But the Court, considering that the witness was an aged man when his deposition was taken, and had died since, and stating that it appeared by the dep-

osition that one of the counsel for the defendant had accepted notice to take the deposition, and appeared and cross-examined the witness, admitted the deposition to be read in evidence.

The act of Congress on the subject, the 30th section of the Judiciary act of 1789, 1 Stat., 88, provides, that when the testimony of any person shall be necessary in a civil case, who is ancient or very infirm, or under other circumstances, his deposition may be taken *de bene esse*, before a Justice or Judge of a Court of the United States, or a Justice or Judge of a Supreme or Superior Court of a State, Mayor or Chief Magistrate of a city, or Judge of a county court or court of common pleas: That, among other things, the witness shall be carefully examined, and cautioned and sworn to testify the whole truth, and shall subscribe the testimony by him given, after it shall have been reduced to writing, which shall be done only by the magistrate taking the deposition, or the deponent in his presence: And that the deposition shall be retained by him until he deliver it to the Court, or shall, together with the certificate of the reasons of its being taken, be by him sealed up and directed to the court.

Heretofore, in the State of Virginia, there were county justices, who were judges of the county court. It is supposed depositions might properly be taken before them. But in West Virginia, since it came into existence in the year 1863, it has been different.

In this State the Justices are elected by townships, and their jurisdiction is limited to townships, and restricted to special classes of cases in which the amount of money or value of property claimed does not exceed one hundred dollars, exclusive of interest and costs. Constitution of West Virginia, Art. 7, § 2; Code of W. Va., p. 32; Acts W. Va., 1863, Ch. 122, ss. 12, 15, 16, 17, 18, p. 188. Code W. Va., Ch. 50, ss. 1, 4, 8, 9, 10, 11.

Such a justice of a township is certainly not a Judge of a county court.

In the act of Congress, Judges of Courts having the high-

est jurisdiction are specified as those to whom the trust to take depositions is confided. The Judges of the different Courts are carefully enumerated, by whom they may be taken. Why is this done, if the provision was intended to apply not only to Judges of Supreme and Superior Courts, having unlimited or general jurisdiction, but to the lowest justices, having the smallest special authority? The designation of different classes of Judges of high grade was idle, if it was intended to include all Judges and justices. A simple mention of these generally would have expressed such intention naturally and concisely.

In England the Court of Common Pleas had, and it is supposed still has, unlimited jurisdiction in all civil actions.

Lord Coke speaks of the Court of Common Pleas as "the lock and key to the common law in common pleas;" and assigns, as the reason for this designation, that "herein are real actions whereupon fines and recoveries pass, and also other real actions by original writs, and also common pleas mixed and personal."

In Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, and North Carolina, and perhaps other States, there have been, and in some of them still are, Courts of Common Pleas. Each of these, it is believed, had, and of such as still exist, yet has, high and general, if not the highest and most general, jurisdiction in civil cases.

A justice of a Township in West Virginia is not a judge of a court of common pleas, by such name. Nor has he the jurisdiction that every such court has had.

The act of Congress specifies the reasons for which, the officer before whom, and the manner in which depositions shall be taken and certified, in order that they may be read on the trial of an action at law. There is no general or other law authorizing the taking or use of depositions in such cases. Where, then, the statute in question has not been complied with, the deposition cannot be read.

An agreement, made before a Court or officer having jurisdiction or authority over a subject, or made out of court

with reference to a pending suit, and filed with the papers of the case, that a party will forego a legal advantage, is perhaps irrevocable, and may be used on the trial of the case. But, it is supposed, an agreement made in the country, before a person having no authority in the premises, that a party would waive the law, would not deprive him of its protection.

If express consent can confer authority on an officer or person not authorized, to take a deposition, or bind the party to its being read as evidence, the mere appearance of the party or his counsel, and cross-examination of the witness, is not consent that will confer such authority or create such obligation. When, at the instance of a party to a suit, an unauthorized officer or person proceeds to take a deposition, it is not probable that an objection made by the opposite party, would cause him to desist. At any rate, it is not necessary that the latter should object at the time. As the officer has no authority, and the entire proceeding is unauthorized, the party against whom the deposition is offered, may object before the court that will decide the question, and refuse to allow the deposition, taken contrary to law, to be read. There is no other tribunal before which or time when such objection may be properly made or decided.

But the justice having no authority to act in the premises, his statement, that counsel was present, is not evidence of an appearance. The unsworn certificate of a private person or officer having no authority, that a party submitted to his authority, fails utterly to prove the fact. The authority, when it exists, gives the sanction to the certificate. Without the former, the latter is not evidence of any fact for any purpose.

It is proper that the party at whose instance the deposition is taken should show, and the officer who takes it should ascertain and state, the reason for which it is taken, in order that the adverse party may inquire as to the fact, and, if he thinks it expedient, controvert the statement.

Unless he knows the fact relied on, he cannot prepare to disprove it.

It is manifestly material that the witness be, by the officer, carefully cautioned and sworn to testify the whole truth; and that the testimony should be reduced to writing by the magistrate or the deponent in his presence.

It is the duty of the officer, not only to do what the law requires, but to certify what he does, in order to show what is necessary to make the deposition evidence. What he does not certify he cannot be presumed to have done. *De non apparentibus et non existentibus, eadem est lex.*

The deed for the land sold for the non-payment of taxes was valid, and passed the title to the land from the Plaintiff in the action, the defendant in error, who recovered the land; and the deed should have been permitted to be read.

The Plaintiffs gave evidence tending to prove that Peter Sken. Smith and others, heirs of Peter Smith, Plaintiffs in the action, mentioned in the third count of the declaration, had an estate in fee in one eighth part, undivided, of the tract of land containing 20,000 acres, consisting of twenty-one smaller tracts; a part, 4,000 acres, of which was the land described in the declaration, for the recovery of which the action was brought; and claimed that they had such an estate in the entirety of the land. The defendant read in evidence an act of the General Assembly of the State of Ohio, passed in the year 1834, and another passed in the year 1850, the former incorporating the Oberlin Collegiate Institute, and the latter changing its name to Oberlin College: And a deed, dated in the year 1853, from Peter Sken. Smith and others to the trustees of the Oberlin College for the bargain and sale of the tract of land: And a deed, dated in the year 1854, from the Trustees of the Oberlin College to Uriah Thompson, one of the Plaintiffs in the action, who is the defendant in error, granting 10,827½ acres of the land, situated in the county of Doddridge. The Defendant then offered evidence that, in that county, Uriah Thompson had been assessed with taxes on the land so granted to him for the

year 1857, which was returned delinquent for the non-payment of the tax; that Charles C. Davis was Sheriff, and Toliferro K. Knight was Recorder of the county of Doddridge, at the several times when the sale and deed hereinafter mentioned were respectively made: And with such evidence offered to read a deed, dated the 26th day of March, in the year 1866, from the Recorder mentioned to John S. Hoffman, reciting the facts just mentioned; and that the land was, on the 26th day of October in the year 1860, sold for the non-payment of the tax, and purchased by John S. Hoffmann, as appeared by a copy of the list of real estate in the county of Doddridge, sold in the year 1860 for the non-payment of taxes, which was returned to the County Court of the County of Doddridge, and a copy thereof by the court then ordered to be certified to the auditor; that a report specifying the metes and bounds of the land and the names of the owners of adjoining tracts, and giving such description of the land as identified it, was made by the surveyor of the county to the Judge of the Circuit Court of the County, in vacation, on the 24th day of September, in the year 1866, and the court then ordered it to be recorded, which was done: And granting and conveying the land described therein: Which deed was, on the 27th day of March, in the year 1867, recorded in the county of Doddridge. But the Plaintiffs objected to the reading of the deed, and the court refused to permit it to be read.

In some of the States of the Union, legislation for the sale of land for taxes has been strictly construed; and prerequisite and attendant proceedings have been closely scrutinized and adversely considered. Such, perhaps, was heretofore the practice in Virginia. But in the years 1809, 1814, and 1832, the Legislature of Virginia, and in 1866, that of West Virginia, indicated a very different and much more liberal policy. 2 R. C. 1819, App. 4, ch. 17, s. 8, p. 532; ch. 24, s. 38, p. 551; Acts 1831–2, ch. 72, s. 22, p. 65; Acts 1866, ch. 90, s. 21, p. 89. In the year 1853, the Supreme Court of Appeals of Virginia approved the more

liberal legislation on this subject, and the President, pronouncing the opinion of the court, portrayed its benefits to the country, and commended a policy that would uphold the titles it was intended to ~~secure~~ confer. Flanagan *vs.* Grimmet and others, 10 Grat., 421; see 425 *et seq.* In the year 1868, at the late revisal, and in the year 1871, the Legislature took great pains by such sales to confer valid and reliable titles, and make them the means of passing and uniting conflicting claims, and perfecting and quieting titles. Code W. Va. 1868, ch. 31, ss. 25, 26, 27, 29, 40; Acts 1871, ch. 194, p. 247.

It is supposed the courts, in their consideration of this important subject, by the employment of uniform rules of construction, such as prevail in other classes of cases, will ascertain the intention of the Legislature, and apply it to cases as they arise. It is not perceived that the courts have either the constitutional or legal power, or the moral right, to adopt discretional rules of construction, variant in different classes of cases, that may thwart the policy of the Legislature and favor a different one, because by the judiciary it may be deemed preferable.

It is certainly the province of the courts, as well as the Legislature, carefully to guard the title of the owner of land, who has properly paid the taxes, or who may have been materially prejudiced by irregularity in the proceedings relative to a sale for their non-payment. The security to the owner for his title to land returned delinquent, however, ought to depend upon rules more appropriate than mere accidental informalities, that would not impair the validity of other legal sales or proceedings. If a case is not proper for a sale, none should be made. If a sale ought to be made, it should be regarded squarely as other legal transactions. A biased treatment of such sales destroys confidence in the titles thereby acquired, prevents competition among purchasers, and often occasions the sacrifice of a large part of the land for the payment of a small amount of taxes. Though prompted by a laudable

desire to protect the owners from loss, it thus directly tends to their serious detriment.

The greatest of civil evils from which the people of what is now West Virginia have suffered, is the confusion and uncertainty in land titles. Perhaps all other causes together have not so effectually retarded their growth and prosperity. In view of this fact, it would seem that the Legislature should never, ~~when it is avoidable,~~ allow the sale of a bad or doubtful title, ~~when it~~ can effect the sale of a good and certain one; and that the Judiciary should reasonably support any proper effort of the Legislature to mitigate, or at least to avoid the aggravation of so serious a calamity. Whenever a sale is made that is ineffectual to pass the title, a new claim is put abroad with which the claimant may be deceived himself, and innocently or corruptly harass or impose on others. When a sale is of questionable validity, the former owner as well as the purchaser, and all claiming under them, suffer from the doubt, and most pernicious insecurity and disastrous litigation are the result. The adoption of rules for the construction of laws and proceedings relative to sales of lands for taxes, different from those applied in other classes of cases, especially when prejudicial to the titles intended to be conferred, greatly enhances these evils.

If the policy of the Legislature on this subject be adhered to, in the spirit in which it was adopted, it is believed confidence in sales will be enhanced, comparatively small parts of lands will be sold for the taxes, and those will be purchased by the industrial classes, who will remove the forest and cultivate the soil.

The only objection made at the trial, to the deed from the Recorder of Doddridge to Hoffman, was, that after the sale of the land, in the year 1860, the 37th Chapter of the Code of Virginia of 1849, under which the sale was made, was repealed by the 32d section of the 90th Chapter of the Act of the Legislature of West Virginia, passed in the year 1866. What may be urged in argument, against the deed, is not foreseen.

By the 3rd, 4th, 5th, 7th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, and 21st sections of the 37th Chapter of the Code of Virginia of 1849, it was provided, that when lists of real estate, delinquent for non-payment of taxes, had been, by the auditor delivered to the Sheriffs, notice should be published, that the real estate, or so much of it as should be necessary to pay the taxes and charges, would be sold at a time specified: That if the taxes and charges were not previously paid the Sheriff should make sale accordingly: That the Sheriff, on receiving from the purchaser the amount of purchase money, should grant to him a memorandum of the sale, particularly setting forth the material facts relating to the land, the tax, and the sale, to which should be annexed a receipt for the purchase money: That the Sheriff should make a list of the real estate sold, setting forth the material facts, annexed to which should be an oath subscribed and taken by the Sheriff: And that the list, with the certificate of the oath attached, should be returned to the Court of the County; and that if the Court saw no cause to doubt the correctness of the list, the court should order a copy to be certified to the auditor: That the owner or others might redeem the real estate within two years from the sale: That when an entire tract of land was sold, and not redeemed within that time, the purchaser might have a report made to the County Court, specifying the metes and bounds of the land and the names of the owners of the adjoining tracts, and giving such further description as would identify the land; and that the court, unless it should see some objection to the report, should order it to be recorded: And that after the expiration of the two years, the purchaser of land not redeemed might obtain from the Clerk of the Court of the County, a deed, in which should be set forth the circumstances appearing in the Clerk's Office in relation to the sale; and which should refer to the report made by the Surveyor: But if no such deed or order of court should be made within one year after the expiration of the two years mentioned, the former

The constitution, in the ninth article, has a declaration directly applicable to the case under consideration, which is this:—

"All private rights and interests in lands in this State, derived from or under the laws of the State of Virginia, prior to the time this constitution goes into operation, shall remain valid and secure."

A legislative intention to divest or destroy a vested private right is not presumed, when such a purpose is not indubitably manifest. The literal meaning of words and phrases is often disregarded to avoid such a conclusion.

By the 17th section of the 16th Chapter of the Code of 1849, it was enacted, that in the construction of all statutes the rules therein declared should be observed, unless such construction should be inconsistent with the manifest intent of the Legislature: And by the 18th section, it was declared, that no new law should be construed to repeal a former law, as to any right accrued or claim arising under the former law, or in any way to affect any such right accrued or claim arising before the new law took effect. Pp. 100, 102.

This was not intended to qualify the repeal of acts, by the Code: For another provision for that purpose was contained in it. Ch. 216, the last in the Code, ss. 1, 2. The declaration of law stated, was manifestly intended as a general rule, applicable to subsequent repeals. While it remained in force, it is supposed it would qualify subsequent repealing statutes or clauses, unless the intent to disregard it was beyond question.

By the Constitution of West Virginia, the County Court and its Clerk were abolished; and provision was made for a Recorder, who succeeded to many of the duties of the County Court and Clerk.

In the year 1863, at the first session of the Legislature of the new State, an act was passed, providing that reports, to be made under the 16th section of the 37th Chapter of the Code of Virginia of 1849, (the edition of 1860 was referred to,) should be made to the Circuit Court or the Judge

thereof in vacation; and that deeds, to be made under that chapter, should be made by the Recorder of the county, and recorded in his office. Acts 1863, ch. 58, p. 58.

This act, as far as it applies to lands sold previous to or in the year 1860, was not repealed by the act passed in the year 1866, but remained in force when the deed in question was obtained and recorded.

By the 22d section of the 27th Chapter of the Code of 1849, (the 23d section of the same chapter, edition of 1860,) it is provided, that when the purchaser of real estate sold for the non-payment of taxes shall have obtained a deed in the manner prescribed, and caused it to be recorded, such estate shall stand vested in the grantee in the deed, as it was vested in the party assessed with the taxes at the commencement of the year for which they were assessed, notwithstanding any irregularity in the proceedings under which the grantee claims title, unless such irregularity appear on their face; and that if it be alleged that the taxes were paid, the party making the allegation must prove its truth.

In the case of Flanagan *vs.* Grimmet and others, 10 Grat., 421–434, 5, *et seq.*, and Hobbs *vs.* Shumates, 11 Grat., 516, it was held, that the deed made by the proper officer, in regular form, for the land sold, is, *prima facie*, evidence that the title passed.

In the case of the Randolph Justices *vs.* Stalnaker, 13 Grat., 523, see 525–6, it was considered, that the failure to comply with an immaterial regulation of the statute, though apparent on the face of the proceedings, does not impair the validity of the sale.

By the deed, when it was recorded, any title that Uriah Thompson may have had to the land on the first day of January, in the year 1857, passed from him to John S. Hoffman.

As the deed was rejected, there was no foundation for the reading of a deed from Hoffman to the heirs of Caleb Boggess and John R. Boggess, the grantees from the Com-

monwealth, of the land in controversy, under whom the defendant claimed it. But this is not material.

In the action of ejectment for the recovery of real estate, (as in the action of detinue for the recovery of personal property,) the plaintiff must have the title or right at the commencement of the action and at the trial, in order to succeed. Without this, the jury cannot find that he has the estate, and the court cannot pronounce judgment that he recover the possession.

In the old action of ejectment, prosecuted in the name of an assumed lessee, the fiction was, that the owner of the land leased it to the tenant for a term, and that he was ousted of the possession; and, though pending the action the owner, who was alleged to have executed the lease, may have conveyed the land, the recovery by the lessee of the term unexpired enured to the benefit of the alienee, who was assumed to be but a ~~remainderman~~ reversioner, entitled to the possession of the land after the expiration of the term. If the alleged term expired pending the action, the Plaintiff could not recover without amending his declaration and enlarging the alleged lease to a period that would include the time of the trial and recovery.

But since the passage of the Code of Virginia of 1849, the action is prosecuted by the owner of the land, in his own name, for its recovery. The verdict is for the Plaintiff who appears to have, at the time of the trial, the right to the possession of the premises, against the defendant who, at the commencement of the suit, was in possession thereof or claimed title thereto. It may be noticed, that in the provision of the Code, on this subject, with reference to the time of the finding, the present tense is used, as to the Plaintiff's having the right of possession; but the past tense as to the defendant's possession or claim of title is employed. By this distinction, the time when the Plaintiff must have the right of possession in order to recover, is clearly indicated to be the time of trial. The verdict also specifies the estate found in the Plaintiff. When the Plaintiff has no such right, the verdict is for the defend-

ant. And, it is expressly declared, if the right of the Plaintiff expire after the commencement of the suit, the verdict shall find the fact, and the judgment for the Plaintiff shall be for the damage for withholding the possession only, and as to the premises the judgment shall be that the defendant go thereof without day. Code of 1849, Ch. 135, ss. 23, 24, 28, p. 561.

The title to the land forfeited for the non-payment of taxes, or for the failure to have it entered for taxation and charged with taxes, was not transferred to any person under whom the Plaintiffs in the action claimed, or any or either of the Plaintiffs themselves. The taxes charged to successive persons under whom they claimed, before the year 1831, *together exceeding the sum of ten dollars, the tax charged to one of them alone, remaining in arrear, though less than that sum, was not relinquished. The instructions excepted to were erroneous.*

The parties, respectively, gave evidence tending to prove, that in the year 1797 the Commonwealth of Virginia, by twenty-one patents for as many adjoining tracts, granted to Jabez Bacon, in all, a tract of land containing 20,000 acres, on Waters of Middle Island, described as in the county of Ohio, but a part in the county of Harrison, after the year 1815, a part in the county of Tyler, created in that year, and after the year 1845, the whole in the county of Doddrige, created in that year: That in the year 1806 Jabez Bacon died, leaving eight children: That in the year 1815 Nathaniel Bacon, by deed, quit-claimed to Philo Murray all the title or interest he had to or in the land: That in the year 1815, before the deed from Bacon to Murray was made, Philo Murray, by deed, bargained and sold the land to Peter Smith, and covenanted to warrant it generally: That in the year 1837, Peter Smith died, leaving heirs: That in the year 1787, before the grants by the Commonwealth to Jabez Bacon, the Commonwealth of Virginia granted to John Reed five tracts of land, containing each 2,000 acres, adjoining each other, making together a tract containing 10,000 acres, which included the land claimed by the heirs

of Caleb Boggess and by John R. Boggess, under whom the Defendant claims the land in controversy: And the parties agreed that the land granted to Reed was not entered on the Land Books of the Commissioners of the revenue for the county in which it lay, and, therefore, in the year 1836, was forfeited to and vested in the Commonwealth.

The parties, respectively, gave evidence tending to prove, that in the year 1817 Peter Smith sent David Curtis, a surveyor, and William Underwood, another agent, to find the land granted to Bacon: And that they found some of the corners: That in the year 1818, they surveyed the land: That about the year 1820, Gerrit Smith claimed to own the land; and Underwood became his agent: That in the years 1826, 1829, 1833, and 1836, respectively, Underwood, as agent for Gerrit Smith, placed tenants on the land, who took and held possession of small parts of it, outside the boundaries of the land granted to John Reed: That about the year 1837, Underwood put Gideon Roberts in possession of a part of the land, who improved about twenty acres, a part of which was within the boundaries of the land granted to Reed; and he remained there some years and then left; after which a school was kept in the house that he had occupied: That Peter Smith paid taxes on the tract referred to in the deed from Murray to him, for a number of years:

That the tract of land containing 20,000 acres was returned delinquent for the non-payment of taxes thereon for the years 1799, 1800, 1812, 1813, 1814, and 1826, amounting to $45 80, no part of which was ever paid.

That the Commonwealth of Virginia granted to Caleb Boggess, in the year 1846, a tract of land containing 586 acres, in the year 1847, a tract containing 40 acres, and in the year 1849, a tract containing 158 acres, adjoining each other; and that he paid the taxes chargeable thereon: And that the Commonwealth granted to John R. Boggess, in the year 1854, a tract of land containing 5,200 acres, adjoining the other tracts: All which are within the grants by the

Commonwealth to John Reed, the land embraced by which was forfeited to the Commonwealth: That Caleb Boggess died before the institution of the suit, leaving heirs: And that, under his heirs and John R. Boggess, the defendant claims the land in controversy.

The court instructed the jury as follows:

"1st. That if the jury believe that the lands in controversy are within the grants to Jabez Bacon, and that they were delinquent for the non-payment of taxes prior to 1815, and that the amount for which they were so delinquent exceeded ten dollars, and were not paid or released by law, then, under the act of 1831, they became forfeited, and the forfeiture was absolute in October, 1834, and all the right and title of the patentee, Bacon, vested in the commonwealth.

"2nd. And if they further believe that the plaintiffs, or those under whom they claim, took charge of the lands within the grants to Jabez Bacon in 1817, and exercised authority over them, and that in 1826 they took actual possession of the same, and have so continued in possession of the same up to the institution of this suit, claiming them as their own under the Bacon grants and the deed to Peter Smith, paying all taxes duly assessed and charged against them on such lands, and all taxes that ought to have been assessed and charged against them, then the Bacon lands, (if) forfeited as aforesaid to the commonweath, became and were actually vested in the plaintiffs, or those under whom they claim, in October, 1834, under the act of 1832; but if the taxes assessed and due upon the lands against Smith do not amount to ten dollars, they are released by the act of 1832.

"3rd. That if the jury believe from the evidence that the land in controversy was covered by grants to John Reed as well as by grants to Jabez Bacon, and that the grants to Reed were the eldest, and that under the act of 1835 they became forfeited for non-entry, and that said forfeiture was absolute in November, 1836, that the plaintiffs were the *bona fide* occupants of the land in controversy, or any part thereof, claiming title to the same, and that they have paid all taxes duly assessed, charged, or chargeable against them from the time when they acquired their title thereto, that the lands in controversy so forfeited in the name of John Reed, under the act of 1835, became transferred and absolutely vested in the plaintiffs, or those

under whom they claim, and that, if the taxes charged against Peter Smith on the Bacon lands before 1832 were delinquent for less than ten dollars, they were released by law."

Of the first of these instructions neither party complained. But to the second and third, the Defendant in the action excepted.

In the year 1779, an act was passed by the General Assembly of Virginia, establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands.

No general or connected survey or map of the lands of the State, waste or appropriated, was ever made.

Whoever desired to acquire title to unappropriated lands, paid the price to the State, and obtained from the Register of the land office warrants to any surveyor, to locate the quantity of land specified: And located it on such land as he supposed had not been appropriated. The surveyor of the county, in which the land was situated, entered the locations in his book kept for the purpose. It then became his duty, (unless, after notice, the locator failed to attend,) to survey the land, and plainly mark the lines and corners, or cause an assistant to do so. After the opening of the land office, during the residue of the last century, there seems to have been an extraordinary struggle to locate and obtain grants for lands in that part of the State West of the Allegheny mountains. About the same time, perhaps owing to the number of large tracts located and to be surveyed, in order to the emenation of grants, surveyors became most remiss in the performance of their duties. In many instances the surveyors, or their assistants, acted as agents of distant adventurers to make locations, while they were required by the law to make the surveys. They, as well as other agents, too often gave little attention to the interest of the locators. They failed to describe either locations or surveys, and neglected to mark the lines or corners of the tracts, so that, from the description, a subsequent locator might know what land was appropriated and what

remained unappropriated, subject to location and grant. The result was, that many large surveys were made, or pretended to have been made, and grants issued, with little in their description to indicate the general locality, and less or nothing to ascertain their specific boundaries. They often included the same lands, in whole or in part, again and again, as many as five or six, and sometimes, it is supposed, twice that many times.

There was, in many instances, enough in the description to locate the surveys and grants, when what it referred to happened in fact to be ascertained. And in such cases they were held valid. But there was no record or other clue by which a locator or purchaser could learn certainly whether particular land had been previously surveyed or granted. It was from the beginning, and more especially after the lapse of years, often very difficult to learn the fact. He must trust to chance for information on the subject,

In time, many lands entered on the books of the Commissioners of the revenue, and charged with taxes, were returned delinquent for the non-payment of the taxes, while others were not entered on the books for taxation. It is believed that on three-fourths of the lands in that part of Virginia, West of the Allegheny mountains, that now constitutes West Virginia, no taxes were paid for many years. From time to time, various laws were enacted, providing for the sale, forfeiture, and other disposition of such lands. After much vacillating legislation a policy was adopted, which in the main, but with some faltering, has been since and still is adhered to. So much of this only as may affect or illustrate the case under consideration will be mentioned

Most of the legislation on this subject to be examined related only to lands West of the Allegheny mountains. But it is not important to distinguish what was so limited in its application, from what was applicable throughout the State.

It was, by the General Assembly, deemed just and expedient, that lands upon which taxes had been charged,

that were returned delinquent for the non-payment of such taxes, which had not been paid; and lands that had not been entered on the Books of the Commissioners of the revenue for the counties in which they were situated, and charged with the taxes chargeable thereon; unless the taxes on the former should be paid, and the latter should be entered on such books and the taxes should be charged on them and paid, within a definite period; should be forfeited to the President and directors of the Literary Fund, subject to the control of the Legislature; or directly to the Commonwealth: And that when such lands were held by persons who had, in good faith, regularly acquired a title, apparently complete and valid, immediately from the Commonwealth, or mediately through one or more persons, who had paid to the Commonwealth the consideration demanded for the land, as if it had been in fact unappropriated, and had not disposed of, or lost such title; and so the holder had a just claim to the land, so held and derived; and had settled and improved the land; and had paid the taxes chargeable thereon to him; but because of a collateral title under another grant from the Commonwealth, of which the holder of such claim had no reliable means for obtaining information, the apparent title and just claim of the holder was in fact invalid; the forfeited title should be transferred to him.

Accordingly, in the year 1831, an act was passed concerning lands returned delinquent, making disposition of certain lands of that class for the benefit of actual and *bona fide* holders thereof under grants from the Commonwealth. Acts 1831–2, chap. 28, p. 87, *et seq.*

By the 2nd and 3rd sections of this act, it was, among other things, enacted, that lands returned delinquent for the non-payment of taxes for the year 1820, or any year or years previous thereto, which had not been redeemed or exonerated from arears of taxes due thereon, and should not be redeemed before the 1st day of January next thereafter; and lands returned delinquent for the non-payment of taxes for years subsequent to the year 1820 and prior to

the passing of the act, that had not been redeemed or otherwise exonerated from arrears of taxes due thereon, and upon which all arrears of taxes that had accrued, with ten per cent. per annum damages, should not be paid before the first day of November in the year 1833; should be, and were thereby declared to be, after such respective times, absolutely forfeited and irredeemable; and that such lands, and the title and interest to and in them of the persons in whose name they were returned delinquent, and all persons claiming under them, should be thereafter, and were declared to be, thereby absolutely vested in the President and Directors of the Literary Fund.

And, by the 8th section of the act, it was recited, that it was known that such lands were held by persons, other than those for whose default they should be forfeited, claiming *bona fide* mediately or immediately under grants from the Commonwealth; and that they had settled and improved the lands; and had moreover paid all public taxes thereon, due and charged and justly chargeable to them; and it was therefore reasonable and just that their titles should be quieted and perfected, so far as the transfer to them of the rights vested in the President and Directors of the Literary Fund, subject to the disposition of the General Assembly, could effect that object: And therefore it was enacted, that all the title and interest to and in such lands, which by the provisions of the act might thereafter be forfeited and vested in the President and Directors of the Literary Fund, might be in the manner prescribed transferred to and vested in persons, other than those for whose default the same should be forfeited, and their heirs and devisees, who were in actual possession and occupation of the lands or any part thereof, for so much as they had just title or claim to from or under grants from the Commonwealth, who should have discharged all taxes duly assessed against them on such lands, and all taxes that ought to have been assessed thereon, from the time when they acquired their titles thereto.

By the 12th, 13th, 14th, 15th, and 16th sections, it was provided how such transfer should be accomplished.

By different acts, the time for the payment of the taxes on lands subject to forfeiture, so as to prevent it, was extended to the 1st day of November, in the year 1834.

By the 2d section of an act passed in the year 1832, it was provided, that such lands as, under the act passed in the year 1831, just recited, might be transferred to and vested in actual and *bona fide* holders, claiming under grants from the Commonwealth, should be, and were thereby declared to be, absolutely vested in such holders, immediately after the forfeiture should accrue to the Commonwealth. Acts 1831-2, pp. 59, 60.

By the same section of the same act, it was provided, that the taxes and damages due upon such lands, returned delinquent for the non-payment of taxes thereon for the year 1831, and years prior thereto, which had not been redeemed or exonerated from arrears of taxes thereon, if the amount of taxes, exclusive of damages, should not exceed ten dollars, should be and were thereby relinquished, and the lien therefor was discharged: But as to such lands the taxes on which, exclusive of damages, should exceed the sum of ten dollars, for the year 1831, and for each and every year prior thereto, added together, the provisions of the acts then existing should remain and continue in full force.

And in the year 1835, an act was passed, by which it was recited that many large tracts of land, that had been granted before the 1st day of April, 1831, never were, or had not for many years been, entered on the books of the Commissioners of the revenue where they lay, by reason whereof no forfeiture for the non-payment of taxes had occurred, or could accrue under existing laws, the Commonwealth was defrauded of her just demands, and the settlement and improvement of the country was delayed and embarrassed: And therefore, by the 2nd section of the act, it was enacted, that the owners of such lands should, on or before the 1st day of July, 1835, enter, or cause to be entered, on the books of the Commissioners of

the revenue of the counties in which they lay, such lands, owned or claimed by them, through title derived mediately or immediately under grants from the Commonwealth, and have them charged with all taxes and damages in arrear, or properly chargeable thereon, and actually pay and satisfy all such taxes as would not have been relinquished and exonerated by the second section of the act passed in the year 1832, on that subject, had they been returned for their delinquency, prior to the passage of the act: And that upon their failure to do so all such lands, not in the actual possession of the owner, by himself or his tenant, should become forfeited to the Commonwealth, after the 1st day of July, 1836.

And by the 3rd section it was enacted, that the title and interest that might thereafter be vested in the Commonwealth, should be transferred to and vested in persons, other than those for whose default the lands should have been forfeited, their heirs and devisees, who were then in actual possession of the lands, or any part of them, for so much as such persons might have just title or claim to, held or derived from or under grants bearing date previous to the 1st of April, 1831, who should have discharged all taxes duly assessed and charged against them, and all taxes that ought to have been charged thereon, from the time when they acquired their titles thereto. Acts 1834–5, Chap. 13, p. 12.

By a subsequent act, the time within which such lands, subject to forfeiture, might be entered on the Books of the Commissioners of the revenue, and the taxes charged and paid, so as to prevent the forfeiture, was extended to the 1st day of November, in the year 1836.

Nathaniel Bacon was but one of eight heirs, on whom the title to that part of the land granted to Jabez Bacon, that was not within the grants to John Reed, and the claim to that part of the land granted to Bacon that was within the grants to Reed, descended, if a claim without title or possession could descend; and but one eighth part descended to him. Nathaniel Bacon's deed to Philo Murray,

and Murray's deed to Peter Smith, with the warranty, could not pass to the latter more than that interest. From the year 1815, the date of the deed to Smith, till his death, in 1837, he had no just title or claim, *bona fide* held or derived from the Commonwealth, to anything more than this.

Peter Smith never had actual possession of any part of the land granted to Bacon, either outside the grants to Reed or inside of these grants. The only actual possession of these lands that the evidence tends to prove was, that of tenants, put on parts of the land by Underwood, as agent of Gerrit Smith. The possession of the tenants of the latter was not that of the former.

The evidence tends to prove, that Gerrit Smith claimed that a deed had been made by Peter Smith to him, Gerrit Smith, and Daniel Cady, and from the latter to him, Gerrit Smith. There is no evidence tending to prove privity between Peter Smith and Gerrit Smith, or any subordination of the pretended title of the latter to any title of the former, recognized as continuing at the time the possession was taken, or during the time it was held. Gerrit Smith, if he claimed the land at all, claimed it as his own, in fee absolute, adversely to Peter Smith and all others.

The claim of a person, by deed or otherwise, to have acquired the title of another to land, is as completely adverse to such other as if the former claimed to have acquired the title from a third person; and the character of the claim gives the character to the possession. Blight's Lessee *vs.* Rochester, 7 Wheat., 399; Boone *vs.* Chiles, 10 Pet., 177—see 224.

There was no evidence that was sufficient or competent to prove, or tended to prove, that Gerrit Smith, or any or either of the Plaintiffs, had any just title or claim to the land, *bona fide* held or derived from the Commonwealth, before the death of Peter Smith, in the year 1837.

It is unquestionable, that the evidence should tend to prove a fact, before it should be supposed as one of the premises of an instruction by the court to the jury.

It is thought to be equally true, that the evidence, if the testimony of witnesses be believed, should be sufficient to prove the fact—such as would warrant the jury in finding it; though, if there be conflict or doubt as to the credibility of the testimony, not such as to require that the jury should find the fact. Though the truth of the testimony must be determined by the jury, and cannot be decided by the court, it is believed the sufficiency of the elementary facts proven, to authorize the inference of another fact more immediately involved in the issue, should be decided by the court. The same facts satisfactorily proven, either by documentary or other written evidence, or the oral testimony of witnesses, should in all cases have the same effect, and produce the same result. This is especially important in litigation relative to lands granted in large tracts, but divided into small ones, severally claimed by many persons; when the same facts apply to the title of all, though that of each may be contested in separate cases, and tried by different juries. Identical facts in each case should sustain or overthrow the title of each claimant. But if from these, without the aid of the court, the different juries may draw variant conclusions, and find diverse verdicts, the same facts will constitute a title for a claimant as to one part of a tract, and defeat it as to a claimant of another part; and there will be no redress for either that may be injured.

When there is not evidence to warrant the jury to find facts, why should the court predicate such, as the foundation of an instruction? If the facts do not justify the verdict, the court will set it aside for a new trial. Why should the court so instruct the jury as to promote such a verdict? As this would be idle, the instruction is an indication by the court to the jury that, if they believe the evidence, it is sufficient to prove the facts predicated, and warrant an accordant verdict.

The first possession of any part of the land granted to John Reed, of which the land in controversy is a part, was that of Gideon Roberts, which was, according to the testi-

mony of Underwood, taken in 1834, but according to that of John J. Ash, (both witnesses for the plaintiffs,) not taken earlier than the year 1837. Upon this evidence the court, if requested, might hypothetically assume the possession to have been in the year 1836, and upon that supposition, stated as such, instruct the jury as to the law thereupon: But the court could not from this conflicting evidence decide that the possession was taken or held before the year 1836, or, without indicating that possession taken at such time was necessary, instruct the jury that a conclusion followed, which could only result from possession in that year.

By the certificate of the auditor of public accounts of Virginia, made evidence by Statute, and the abstract from the list of lands delinquent for the non-payment of taxes, certified by the Recorder of the county of Tyler, it appeared that the tract of 20,000 acres of land was charged to Jabez Bacon in the years 1799, 1800, 1812, 1813, 1814, and to Peter Smith in the year 1826; that it was returned delinquent for the non-payment of these taxes—those charged to Bacon exceeding ten dollars, exclusive of damages, and those charged to Smith less than ten dollars, but all together largely exceeding that sum, exclusive of damages; and that none of these taxes were paid.

In connection with the evidence and claim of the plaintiffs in the action, the second instruction imported:—

That if, from the year 1827 to the 1st day of October in the year 1834, Peter Smith was the owner of the land granted to Jabez Bacon, from whom he, Smith, claimed to have acquired it, and that Bacon and Smith successively had been charged with taxes thereon, and the land was returned delinquent for non-payment thereof, and forfeited for the failure of Smith to pay the taxes and discharge the lien of the Commonwealth therefor, subject to which he had acquired the title and held the land, before the first day of October, in the year 1834; his title, forfeited for his default and vested in the President and directors of the Literary Fund, might, under the act of the General Assem-

bly in question, as soon as it was forfeited, be re-transferred and re-vested in him:

That though Peter Smith was the owner of but an eighth of the land, undivided, and had no just title or claim, *bona fide* held or derived from the Commonwealth, to any greater interest, upon the forfeiture under the act, the title to the whole land might be transferred to and vested in him:

That if Peter Smith claimed the land as his own under the grants to Bacon and the deed to him, it was not material whether he had any just title or claim *bona fide* derived from or under such grants or not; but whether he had any title or claim connected with the Commonwealth or not; whether his claim was just and *bona fide* acquired or not, when the title which he claimed to have, was forfeited, it might be transferred to him:

That if Peter Skenandoh Smith and others named in the same count with him, or the Oberlin College, or Uriah Thompson, claimed the land as their own, though none of them had any color of title to the land or any part of it till long after the year 1834, under the act passed in 1832, the title might be transferred to them:

That if the claimants paid the taxes that were and ought to have been charged on the land, at any time, though not till long after the year 1834, and after the emenation of the grants to Caleb Boggess and John R. Boggess, under the act, the title might be transferred to them:

And that though the taxes charged to Bacon and Smith successively on the land, for which it was returned delinquent, largely exceeded ten dollars exclusive of damages, if those charged to Smith alone did not exceed that sum, by the act passed in 1832, they were released.

And the third instruction imported:—

That if the plaintiffs, who did not claim the land till long after 1836, at any time, though not in the year 1835, or till after the grants to Caleb Boggess and John R. Boggess issued, simply claimed the land covered by the grants to Reed, or any part of it, however small, though utterly without just title or claim, *bona fide* held or derived from or under

any grant from the Commonwealth, or any color of title whatever, and if they were at any time, though not before or in the year 1835, *bona fide* occupants of the land, or any part of it, and they had at any time before the trial paid all the taxes charged or chargeable on the land against them; under the act passed in 1835, the title to the whole of that part of the land granted to Reed, which was subsequently granted to Caleb Boggess and John R. Boggess, and is the land in controversy—not merely the part so claimed—was transferred to the Plaintiffs or those under whom they claimed:

And that, though Jabez Bacon and Peter Smith had been successively charged with taxes on the land, and it had been returned delinquent therefor, and the taxes together exceeded ten dollars, exclusive of damages, yet if the taxes charged to Peter Smith alone did not exceed that sum, by the act passed in 1832, they were released.

As part of the facts supposed, upon which the second instruction was given, mention was made of the Plaintiffs, or others under whom they claimed, taking charge and exercising authority over the lands granted to Bacon, and taking and continuing in possession of them. It is supposed these facts, except the possession assumed in the year 1831, do not in any respect sustain the instruction. If, however, they were sufficient and necessary for the purpose, they were equally necessary to support the third instruction; where they were not supposed or regarded. If the latter instruction be not sustained by the hypothesis of facts that the evidence might prove, this is as decisive of the case as if neither instruction was so sustained. With these suggestions this subject will be passed for the present; but it will be resumed hereafter, when it will be more convenient to discuss it farther.

The reasons for the legislation now considered, as well as the structure of the statutes, indicates manifestly that it was intended only to transfer the title forfeited, to a claimant who had an apparent collateral title, deraigned from the Commonwealth, and vested in him, not itself forfeited or in

any manner divested out of him, before or at the time when the transfer might take effect.

The General Assembly had greatly erred in not providing for a uniform survey of lands or a map or other illustration of the relative position of lands surveyed and granted. The public officers had culpably disregarded their duty, when they failed to mark the boundaries of such lands and describe them accurately. When the Commonwealth had granted land, and so parted with her title, and afterwards another citizen, who had no facility to ascertain that fact, in consequent ignorance, purchased the same land from the Commonwealth and paid the price demanded for unappropriated land, and obtained from the Commonwealth a grant therefor, or purchased land from another who had done so, and thus in good faith acquired what on its face was a valid title, he had certainly a very just claim to the land. If he had paid his taxes and had taken possession, he might at least appeal most persuasively to the generosity of the Commonwealth, when the land was forfeited for the non payment of taxes, to relinquish her title in his favour. On the other hand, a purchaser had the convenient means of ascertaining whether a title was regularly derived from the Commonwealth, and if he failed to do so, and purchased a claim not shown by the records to be so connected, but defective on its face, it was his own fault or neglect that he purchased, and he had no ~~demand~~ claim on the justice or liberality of the Commonwealth, to the donation of the title acquired by the forfeiture.

Why should the Legislature, by the same act, forfeit the land of a person who had paid the taxes charged or chargeable to himself after he acquired his title, but not those charged to his predecessor, for the non payment of those taxes, and transfer the title to the President and Directors of the Literary Fund; and at the same time transfer it back, and vest it again in the owner or claimant. The simple way to protect such an owner, when it was desired to do so, was to provide for the exemption of his land from forfeiture.

By the 21st section of the act under consideration, pro-

vision was made that the owner deemed worthy of protection, might have the land exonerated from the taxes for which it was delinquent, and thus prevent the forfeiture.

In the 10th section of the act, which provided for the transfer of escheated lands to holders occupying them, the same language found in the 8th section, was used to describe the persons who, might take and the character of the claims they must have, in order to take the escheated title. In this class of cases, there are no owners of the valid title that had escheated who could hold it. The holders referred to, who should take the title, were necessarily those who claimed under collateral apparent titles. It is supposed that, in the same act, the same words meant the same thing.

If, by the act in question, the forfeited title might be transferred back to the owner who, by the forfeiture, was divested of it, the effect would be, that when land had been granted to a person who had owned it, no matter how long, and failed to pay any taxes whatever, but in the year 1830 conveyed it, subject to the Commonwealth's lien for the taxes, to a person who was charged with and paid the taxes for the years from 1831 to 1834, inclusive, (or perhaps for but one of those years,) the latter might purposely fail to pay the taxes for the former years, and thereby allow it to be forfeited, and acquire the complete legal title, discharged of the lien subject to which he held the land.

By the express provision of the act, however, the owner of the title forfeited could not take it. By successive statutes, the Commonwealth had a lien on the land for the payment of the taxes charged to his predecessor as well as those charged to himself. Acts 1812, Ch. 98, App. 2 R. C. 1819, p. 537, Ch. 205; Act 1819, 2 R. C., Ch. 183, s. 88, p. 39; Acts 1832, Sup. R. C., Ch. 290, s. 8, p. 358. The title to the land came to him charged with this lien. It was for his failure to pay all the taxes not released, and exonerate the land from the lien, that the title was forfeited. Those for whose default the land is forfeited, their heirs or devisees, are distinctly excluded from its benefit.

The law, where it applied, transferred the title forfeited, only for such part of the land as the apparent owner had just title or claim to, *bona fide* derived from the Commonwealth. If he held such title or claim to but a part, undivided, the legislative donation was as effectually limited to that part, as if he held it divided and separated from the residue of the land.

When the owner of an interest in land, less than the whole, paid the taxes and prevented a forfeiture, he retained his interest only. But when he paid what was charged to himself, and omitted to pay what was charged to his predecessor, subject to the payment of which he held his interest, and let the land be forfeited, if he thus got the title to the whole land, the reward was not for the payment of the taxes, but for the failure to pay them.

When the holder or claimant of land had allowed his title or claim to be forfeited, it had passed from him as effectually as if by deed he had bargained and sold it. After the forfeiture for the non-payment of taxes charged to his predecessor, he was not only disqualified to take his own former title or claim, that, by his default he had allowed to be forfeited, but he had no longer that just title or claim that, if not itself valid, would attract the true title, when it was forfeited.

The plain, reasonable, and intelligible meaning of the provisions of the acts of 1831 and 1835, for the transfer of the title to lands forfeited, is, that when a valid title under one grant was forfeited, and any person had a just title or claim under another grant, regularly and in good faith derived from the Commonwealth, valid as far as with ordinary diligence could be discovered, not itself forfeited, but ineffectual because of the former grant, if the holder had paid his taxes and had the requisite possession of the land, he might take the title forfeited.

It would be strange that the Commonwealth should forfeit a valid title, in order to give it to the claimant of a defective one, who had allowed that also to be forfeited.

If the right to take a forfeited title was not limited to the

claimant who had an apparent title, which but for the forfeited title would have been valid, there would be no certainty whatever as to who should take the title that was forfeited. There might be any number of claimants. One might claim under an older grant; another have the older deed; another have first paid taxes. As all the claims would be alike, apparently as well as instrinsically invalid, there is no reasonable rule by which their preference could be settled. By such a construction, a measure that was intended to settle and quiet titles, would produce the most confused uncertainty.

By the provision in the eleventh section of the act of 1831, in question, relative to the manner in which holders and *bona fide* claimants of lands might obtain the title to land forfeited, it was required that the holder or claimant should prefer his petition to the Superior Court of Chancery for the county wherein the land lay, stating and deducing his title to the land. From what other source than the Commonwealth would such a holder or claimant deduce a title, or the semblance of a title? What claim, not so acquired, could be more than the mere incomplete fragment, or colorless pretense of a title? If such mere claim, without a writing, with possession and payment of taxes, entitled him who might assert it, to land that had been forfeited, why did the Legislature require the production of documentary evidence of title?

In the second section of the act of 1835 recited, the phrase "owned or claimed by title mediately or immediately under grants from the Commonwealth," unquestionably implies a regular connection with the grant from the Commonwealth. It is reasonable to suppose, that in the third section of the same act, the same words imply the same thing.

It is certain that, in the acts of 1831 and 1835 in question, the phrases, "persons other than those for whose default they shall be forfeited;" "actual holders and *bona fide* claimants;" "the title of such actual holders and *bona fide* claimants;" "so much as such persons have just

title or claim to, *bona fide* claimed, held, or derived from or under any grant from the Commonwealth, previous to the 1st day of April, 1831;" "from the time he or she derived his or her title thereto;" relative to the persons and character of the claims that may take and will attach the forfeited title; mean something. It is equally manifest, that these words, or most of them, and their meaning, whatever it be, were omitted and disregarded in both or one or the other of the instructions.

In the years 1858 and 1860, by the General Assembly of Virginia, acts were passed for the transfer of titles escheated; and in the year 1868, by the Legislature of West Virginia, at the general revisal, when the subject was long and carefully considered, provision was made for the transfer of titles forfeited. In each instance the legislative sense was clearly indicated by the enactments—in the former two acts, that such transfers should be limited to persons claiming under grants from the Commonwealth, who, but for grants older than those under which they claim, would have just title, legal or equitable; and by the latter acts, to persons (other than those for whose default the lands were returned delinquent or forfeited, their heirs or devisees,) for so much as such persons may have title or claim to, regularly derived, mediately or immediately, under other grants from the Commonwealth of Virginia or West Virginia. Acts 1857–'8, Ch. 39, p. 43; Acts 1859–'60, Ch. 66, p. 17; Code of Va., 1860, Ch., 114, s. 10, p. 553–4; Code of W. Va., 1868, Ch. 31, s. 34, p. 199. These phrases, it is supposed, mean the same thing, at least as far as they apply to the subject in hand. Each implies a claim complete in its deraignment from the Commonwealth or State to the person having it, not by forfeiture or otherwise divested, but remaining in him, that would be a valid title, were it not for the title escheated or forfeited.

In the years 1853 and 1854, by the Supreme Court of Appeals of Virginia, in the case of Wild's Lessee *vs.* Serpell, 10 Gratt., 405, see 401, *et seq.*, and Levasser *vs.* Washburn, 11 Gratt., 572, see 582, as well as at subsequent

times in other cases, acts similar to that passed in the year 1831, transferring forfeited titles, have been considered. In all these cases the different acts have been treated only as applying to persons having claims regularly derived from the Commonwealth, and therefore titles apparently valid.

As has already been suggested, perhaps, under the acts of 1831 and 1835 now considered, three-fourths of the lands in that part of Virginia West of the Allegheny mountains, that is now West Virginia, were forfeited; and the titles under these, and subsequent acts similar in character, have been transferred. Yet there is no case in which it has been held or hinted, that the provisions of any one of these acts applied to claimants of the title forfeited, or any person who did not have a claim apparently valid in its origin and acquisition, remaining in the claimant, who would take the title forfeited.

The language of the act of 1832, relative to the relinquishment of taxes, is so plain, that paraphrase cannot make it more certain or intelligible. It is not the amount of taxes charged to one of several successive owners of land that determines whether the taxes were relinquished, but the amount of taxes charged on the land, remaining due at the time of the passage of the act. If these, exclusive of damages, for all years added together, amounted to but ten dollars or less, they were relinquished; if they amounted to more, they continued to remain due and constitute a lien on the land till they were paid, or the land was absolutely forfeited.

Proof that a claimant of land paid all the taxes charged or chargeable to him thereon, not paid or relinquished, is indispensable, in order to demonstrate his acquisition of a forfeited title. It is a condition precedent to his taking the donation.

The person who *bona fide* derived from the Commonwealth a just title or claim to the land, must have had the possession and paid the taxes on it. The same person

must have performed the three several conditions prerequisite to the acquisition of the title forfeited.

The hypothetical facts assumed in the second instruction will now be further noticed. They are, that the plaintiffs in the action, or those under whom they claimed, took charge of the lands within the grants to Bacon in 1817, and exercised authority over them, and in 1826 took actual possession of them, and continued in such possession till the institution of the suit, claiming them as their own under the grants to Bacon and the deed to Peter Smith, paying all taxes duly assessed and charged against them on such lands, and all taxes that ought to have been assessed and charged against them. It is supposed that Bacon and his heirs are not among the persons here alluded to. For if they, as well as all the other parties under whom the plaintiffs claim, had paid the taxes charged to them on the land claimed by them, the land could not havebeen forfeited in the year 1834, as supposed in the instruction.

It is not enough to support the instruction, that these facts might or might not warrant the presumption that Smith had such just title or claim, so derived, as was necessary to bestow on him the forfeited title. For then the most that could be said would be, that as this fact might or might not be found, the forfeited title was or was not transferred. But this was not the instruction. It was in effect, that if the elementary facts mentioned existed, the conclusion as to the principal fact necessary, as well as the law, that was announced, certainly followed. The instruction was tantamount to this—that if Peter Smith and the Plaintiffs did the acts specified, there necessarily constituted or conferred such just title or claim, *bona fide* derived from the Commonwealth, as is described in the statute; and from these facts, if true, notwithstanding any other facts that the evidence might prove, tending to a different conclusion, the Court might, and should, and did, find and adjudge that the facts mentioned constituted or conclusively proved

such title or claim; and therefore the forfeited title was unquestionably transferred.

If the instruction was not equivalent to this, it implied, that though Smith and the Plaintiffs did not have, or may not have had, any such just title or claim, then, without it, the forfeited title was transferred to them, or one or some of them.

There was no other predication of the just title or claim, necessary to the transfer of the title.

Even this, it will be remembered, is not in the third instruction.

The facts assumed in the second instruction, with or without the other evidence, did not prove such just title or claim, *bona fide* held or derived under a grant from the Commonwealth—if the Court had the right to adjudge what they did prove, as the foundation of an instruction. They did not at all warrant a finding by the jury of such a title or claim, so held or derived.

Gerrit Smith, one of the Plaintiffs, and Hamilton Hill, President of the College, in their depositions, speak of the deeds, or supposed deeds, under which the Plaintiffs claimed. They refer to assumed deeds, which are supposed to be the originals, copies of which were read; and mention others, from Peter Smith to Gerrit Smith and Daniel Cady, and from the latter to Gerrit Smith—none of which could better the claim of the Plaintiffs. Neither of the witnesses speaks of any other deed.

In the second instruction, it was supposed that the Plaintiffs claimed under the deed read in the case, from Nathaniel Bacon to Peter Smith.

There is no pretense of any other deed to him, or any deed from Jabez Bacon, or any others of his heirs, to any person claiming under Peter Smith.

An arbitrary presumption of deeds, would be very dangerous, not only to the security, but to the certainty of titles. The former in West Virginia is perhaps not more important than the latter. Early in the history of Virginia, the Legislature wisely declared, that titles to lands should

pass by deeds; and made provision for their recordation. To allow parol evidence of facts to create the presumption of deeds, invites many of the perjuries that the requirement of deeds and other writings was intended to exclude. In Virginia and West Virginia, deeds, when made, have almost universally been recorded. While the records show the facts that determine who has the title to land, there is comparatively little difficulty in ascertaining these facts. But when parol evidence is deemed sufficient, directly or indirectly, to prove that the title is in others than those indicated by the records, innocent persons are deprived of lands, that in good faith and with reasonable care they purchased, paid for, and supposed they had obtained; litigation is promoted; confidence in titles is shaken; and the settlement and development of the country embarrassed and impeded.

A grant from the Commonwealth could not be presumed from possession, when the statute extinguishing her right did not apply. Gore vs. Lawson and others, 8 Leigh, 458; see 465; Levasser vs. Washburn, 11 Gratt., 572; Pride vs. Usher, 15 Grat., 190, see 201. A deed of conveyance from a citizen, could not be presumed from possession, that would not bar a writ of right, or an action of ejectment, after it was substituted for the writ of right, as well as the former action of ejectment; and so confer title. Bolling vs. Mayor of Petersburg, 3 Ran., p. 563—see 577, *et seq.* There may be an exception to this rule, when the possession has continued long enough to bar an action, but under an equitable right proven to exist, held, ~~however,~~ in subordination to the legal title in another, that would prevent the operation of the statute: Or possibly when the character of the possessor's claim is known to the apparent owner, and he actually encourages or consents to it. But both these classes of cases are more appropriate for relief in a court of equity. 3 Ran., 275, *et seq.*; Edwards vs. Vanbiber, 1 Leigh, 183. It is believed, there is no case in Virginia or West Virginia, in which a principle extending beyond what is here suggested has been established.

At different times, the Legislatures of Virginia and West Virginia have carefully considered the subject of protecting claimants having continuous possession of lands; and have extended to them such security as good policy demands. The statutory regulations on this subject are comparatively simple; and the facts to which they apply generally within the scope of reasonable diligence. These laws tend greatly to the quiet of titles and security of settlers.

Peter Smith, who, as shown by the evidence, had the title or claim granted to Bacon as to one eighth part of the land, never had possession of any part of it.

Taking charge of and exercising authority over land is not possession. Taylor's devisees *vs.* Burnsides, 1 Gratt., 165. Overton's heirs *vs.* Davison, Id., 211.

It would be difficult to believe that the different tenants whom Underwood, the agent of Gerrit Smith, put on parts of the lands, each as tenant, claimed the whole 20,000 acres, or all that part outside the grants to Reed. Underwood, in his deposition, says the several tenants were in possession of parts and parcels of the land. Another witness speaks to the like effect, in part. It is supposed the claims of the several tenants were commensurate with their improvements. It is not perceived by what else they would be bounded. Gerrit Smith had not title or color of title. The possession of his tenants, who had no written lease, or written color, could not extend beyond their improvements. Even if Smith had had color of title, it is supposed his tenants, who had no writing, could not oust the owner of the land, whoever he was, of his constructive possession, and thus enlarge the possession of the several tenants, or either of them, beyond their respective claims of exclusive, though temporary authority. If such possession be not boundless, what else could circumscribe it?

The possession of Smith's tenants was Smith's possession. But their possession could not be his, to a greater extent than it was their own.

From 1826, when Underwood, as agent for Gerrit Smith,

put the first tenant in possession of a part of the land, till 1834, when the land to which Bacon had title became forfeited, was but eight years; till 1836, when the land granted to Reed became forfeited, was only ten years.

By the act of 1831 on the subject, the limitation of a writ of right upon the seisin of the demandant's ancestor or predecessor was twenty-five years; upon his own seisin, twenty years.

By the plat and report of the surveyor, and the grants to Caleb Boggess and John R. Boggess, it is shown, and by the third instruction it is assumed, that the grants to John Reed include the land in controversy. These grants, older than those to Bacon, conferred the title on Reed. They moreover conferred on him what was equivalent to actual seisin. Green *vs.* Liter, 8 Cranch, 229; Dawson *vs.* Watkins, 2 Rob., 259.

On the other hand, the subsequent grants to Bacon conferred on him the title and seisin of the lands outside of the grants to Reed, but conferred neither title nor seisin nor any right whatever to any land within these grants.

Then the actual title and constructive seisin of that part of the land granted to Bacon, outside of the grants to Reed, were as entirely distinct from the part within them, as if the grants to Bacon had been bounded by the outer lines of the grants to Reed.

It appeared that the land granted to Bacon was owned by his heirs, other than his son Nathaniel, and Peter Smith. It was perhaps claimed by Gerrit Smith. In either aspect the possession of the land owned by the Bacons and Peter Smith, or by Gerrit Smith, outside the boundaries of the grants to Reed, could not oust Reed of his constructive seisin, and did not constitute possession of his land within the grants to him. Taylor's devisees vs. Burnsides, 1 Gratt, 165; Overton's heirs vs. Davisson, 1 Gratt, 211.

Even if Smith's possession of lands owned by others or himself, outside the land of Reed, had continued long enough to bar a writ of right before the forfeiture, what tendency could it have to create the presumption of a deed

of conveyance by any one to Smith of the land of Reed? There was no time when such a deed would have been effectual for any purpose, except as color of title to indicate or measure a disseisin, until the act of 1831 made it a means to attract a forfeited title. Why should the law arbitrarily create the presumption of an act, that, according to the law at the time it is assumed to have been done, could have no efficacy but to subserve a wrong?

Neither could the possession by Smith of land of Reed create a presumption that Bacon or his heirs made a deed for Reed's land. They had no reason to complain of an invasion of Reed's domain and no means to obviate it, and no inference can be drawn from their failure to do so.

Nor could Smith's possession, by a tenant or otherwise, of a part of the land within the grants to Reed, create a presumption that Bacon or his heirs, or any one else who never owned the land, or Reed who did own it till it was forfeited, or the Commonwealth that owned it afterwards, conveyed or granted to Smith the residue of the land, outside the foot-hold or claim of his tenants, of which he never had possession.

Perhaps half the lands within the limits of West Virginia were granted in tracts of as much as a hundred thousand acres or more—often, as has been suggested, in whole or in part, again and again to different persons. Many claims under such grants were originally void for want of certainty in the description, or marked corners, or lines. Others were forfeited for non-payment of taxes, or failure to have them entered therefor and charged with taxes. And others were claimed to be conveyed or derived under assumed deeds, wills, and other papers and pretenses, that were false or void. It often happened that such invalid claim lapped upon or included other titles, originally valid or subsequently made so by the forfeiture of the valid title, held by one or many different persons, to the extent of thousands, tens of thousands, and hundreds of thousands of acres. With the knowledge or belief that the adverse claim was spurious, others lawfully purchased

from citizens and obtained grants for such lands, or parts of them, and thus acquired valid titles. Meantime, the wrongful claimant took possession of a part of the land he claimed, outside that so owned by others, or of a part or the whole of the land of one of such owners, but outside the lands of the others.

These had neither interest nor power to prevent or determine such possession, outside the limits of their own lands. Can it be seriously urged, that in such a case the law requires or allows the arbitrary presumption of a valid grant or deed to the wrongful claimant for lands of others, of which he had no possession; that will make his claim so effectual as indirectly to overreach their titles, and enable him to appropriate their lands? Or the wrongful claimant, by a tenant or otherwise, took and retained possession of an inconsiderable part of a large tract owned by another citizen, or owned by the Commonwealth and subsequently granted to a citizen, while he or they successively retained the constructive séisin of the residue. In such a case, can it be supposed, that the law of the Court transcends the statutes for the limitation of actions and their effect, and those for the relinquishment of the Commonwealth's right, and promotes the presumption of a fact that would indirectly destroy the title of the owner of the land? The extent to which such a doctrine would subvert the titles and ruin the owners of lands in West Virginia, is beyond the scope of conjecture.

In the year 1836, the land granted to Reed became forfeited, and the title thereto vested in the Commonwealth. If before that time, either Smith or any one else had disseised Reed and taken possession of any part of his land, nevertheless, in contemplation of law, the seisin, as an element or incident of complete title, vested in the Commonwealth, the disseisor was divested of his wrongful seisin, and his possession became and thenceforth continued to be the possession of the Commonwealth, held in subordination to her title. Staats vs. Board, 10 Grat., 400; Levasser vs. Washburn, 11 Grat., 572.

But the first possession taken by Smith, or any of the Plaintiffs, within the grants to Reed, was about the year 1837, when Roberts built a cabin near an outer line of the land, on which side does not appear, and enclosed about twenty acres, the larger part of which was within the grants to Reed. He remained there some years, and left. After that a school was kept there. There was no other possession under Smith, or any of the plaintiffs, of any part of the land granted to Reed, except what was had after the grant to Caleb Boggess, which will be noticed hereafter.

As was suggested with reference to tenants having possession outside the land granted to Reed, it cannot be believed that Roberts had such exclusive occupancy of all the land of Reed, within the lap of the grants to Bacon, as constituted him, Roberts, the possessor of the whole. In West Virginia, nothing short of such occupancy is possession. Taylor's Devisees *vs.* Burnsides, *ubi supra.* If Roberts did not, as tenant, claim and possess the whole, it is conceived he possessed only what he cleared.

A claimant's cultivation and usufruct of a part of the land of another, and exercise of exclusive control over the residue, within the bounds of his color of title, may constitute that occupancy of the whole, which is possession of the whole, to the extent of such boundaries, and so oust the owner of his constructive possession. A tenancy of a part or the whole of land claimed by one, but owned by another, may exist without color of title. When a person who claims land owned by another, has verbally contracted to let to a tenant a part of it, without written boundaries, and the tenant uses and enjoys a part of the land to which the contract applies, this constitutes possession and ousts the owner only to the extent of such use and enjoyment; or, at most, to the extent of the verbal contract.

Whatever measures the possession of a tenant, it seems clear that his possession cannot be that of the landlord, or any one else, to a greater extent than it is that of the tenant himself.

From the forfeiture of the title of Reed till the first grant to Caleb Boggess was eleven years; till the grant to John R. Boggess was less than eighteen years.

From the first possession of Roberts (if, as soon as he took possession, he improved within the lines of the land granted to Reed) till the times just mentioned, was a year less. But it does not appear when the clearing of Roberts was made within the tract surveyed for Laidley, numbered 25, which was one of the adjoining surveys granted to Reed.

By the act of 1795, amended and re-enacted at the re visal in 1819, unappropriated lands, that had been settled for thirty years, on which taxes were paid, were exempted from entry or location, in order to obtain grants therefor; and any title which the Commonwealth might be supposed to have thereto, was, by the act, relinquished; and a mode was provided by which the party in possession, claiming under the settlement, might establish his right. ~~1 R. C., 1819, ch. 86, s. 40.~~ But it was provided, that the act should not be construed to affect the right of the Commonwealth to any lands forfeited by non-payment of taxes. 1 R. C., 1819, ch. 86, s. 40, p. 330. By the act of 1779, re-enacted at the same time, it was provided, that no warrant should be located on any lands that should vest in the Commonwealth on account of the non-payment of taxes thereon. 1 R. C., 1819, ch. 86, s. 4, p. 323.

As the law expressly forbade the location of a warrant on forfeited lands, in order to obtain grants therefor, and excepted such lands from the provision to relinquish the title of the Commonwealth, a grant from the Commonwealth of such land could not be presumed.

At the revision of 1849, the time of settlement, necessary to occasion the relinquishment, was reduced to twenty years; and the provision that it should not apply to forfeited lands was retained.

If the execution of a deed from Jabez Bacon or his heirs to Peter Smith could be presumed, it was not recorded.

Was not the Commonwealth a creditor for the taxes that were a lien on the land, for the non-payment of which it was forfeited? Was not such deed therefore void as to the Commonwealth and her grantees? Furthermore, were not Caleb Boggess and John R. Boggess subsequent purchasers for valuable consideration, without notice of such deed? And was the deed not therefore void as to them? 1 R. C., 1819, Ch. 99, s. 1, p. 361. Thomas *v.* Gaines and others, 1 Gratt., 347. Notice to a creditor does not make an unrecorded deed valid as to him. If possession be evidence of notice to a purchaser, must not the fact, when it exists, be found, before the deed can be pronounced or assumed to be valid?

In the year 1846, an act was passed, declaring that the title of the Commonwealth to lands, theretofore or thereafter forfeited, should be thereby absolutely transferred to and vested in persons (other than those for whose default the lands may have been forfeited, their heirs or devisees) for such parts as such persons might have just title or claim to, held or derived under grants from the Commonwealth, theretofore or thereafter issued, who should have paid the taxes duly assessed and chargeable thereon against them on such lands, and all taxes that ought to have been charged thereon, from the time they acquired title thereto. Acts 1865–'66, Ch. 6, s. 3, p. 14.

In the years 1846, 1847, and 1849, Caleb Boggess obtained his grants for parts of the land in controversy. And he paid the taxes thereon, as mentioned in the act just quoted.

In the year 1849, at the revisal, it was provided that forfeited lands should be liable to entry, survey, and grant in the same manner as waste and unappropriated lands. Code 1849, Ch. 114, s. 3.

Accordingly, in the year 1854, John R. Boggess obtained the grant for the larger part of the land in controversy.

By these grants the complete title to the land, with the seisin, unimpaired by any previous possession, was vested in Caleb Boggess and John R. Boggess, the grantees.

By the common law no time ran against the Commonwealth. As possession could not directly deprive her of her remedy, it could not directly or indirectly take away her right and vest it in a citizen, otherwise than as by statute was provided. The title in the Commonwealth, unimpaired by possession, was by her grant so transmitted to her grantee. Gore's lessee *vs.* Lawson, 8 Leigh, 458; Staats *vs.* Board, 10 Gratt, 400; Hale *vs.* Branscum, Id. 418; Levasser *vs.* Washburn, 11 Gratt. 572; Usher's heirs *vs.* Pride, 15 Gratt. 190—see 201.

There is no evidence that, after the grants to Caleb Boggess and John R. Roggess, any or either of the Plaintiffs had possession of any part of the land in controversy.

According to the testimony of John J. Ash, the plaintiff's witness, not contradicted, the possession of Gideon Roberts, taken about the year 1837, was discontinued some years, probably about four, before the year 1856, when the witness purchased 215 acres, including the land that had been possessed by Roberts. After that time Ash continued to possess what he purchased, and slightly enlarged the improvement.

It does not appear whether the land of which Roberts and after him Ash, had possession, was outside or inside the grants to Caleb Boggess or John R. Boggess. However that may be, from the time Ash purchased, his claim and consequent possession beyond the enclosure, it is supposed, was circumscribed by the boundaries of the 215 acres.

It is alleged in the declaration, and agreed, that at the time of the institution of the suit, the tenant of Caleb Boggess' heirs and John R. Boggess, the Defendant in the action, was in possession.

But if any or either of the Plaintiffs had had possession from the emenation of the grants from the Commonwealth to Caleb Boggess and John R. Boggess, respectively, till the institution of the suit, it would not have barred the action of the latter or conferred title on the former.

By the act of 1837, Ch. 8, s. 11, p. 12, it was provided, that any person might maintain a writ of right upon the seisin of his ancestor or predecessor within eighteen years, or upon his own seisin within fourteen years next before the test of the writ.

* ~~This law, in its application to causes of action existing when the Code of 1849 took effect, was, at that revisal, continued. Code 1849, Ch. 149, s. 19.~~

John S. Hoffman
Counsel for the
Plaintiff in
error.

* The action of ejectment having been substituted for the writ of right this limitation, in its application to causes of action existing when the Code of 1849 took effect, was, at revisal continued.
Code 1849. Ch 149. S 9

Acts of Virginia
Session
Constituting
part of
20th June
Session act of 1835

Supreme Court of the United States.

DECEMBER TERM, 1871.—*NO.* 41.

CHARLES SHUTTE, Plaintiff in Error,

vs.

URIAH THOMPSON, Defendant in Error.

PROVISIONS OF THE CONSTITUTION AND STATUTES AND DECISIONS OF THE COURTS OF VIRGINIA AND WEST VIRGINIA, APPLICABLE TO THE CASE

Collected at the suggestion of the Court, by

CALEB BOGGESS AND JOHN S. HOFFMAN,

Counsel for the Plaintiff in Error.

LEWIS BAKER & Co., Steam Job Printers, Wheeling, W. Va.

SUPREME COURT OF " E UNITED STATES.

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[Explanations of Counsel, except mere references, are included in brackets, mere references are not. Provisions of the Constitution and statutes and extracts from decisions by the Courts are copied without marks of quotation.]

AN ACT FOR ESTABLISHING A LAND OFFICE, AND ASCERTAINING THE TERMS AND MANNER OF GRANTING WASTE ANE UNAPPROPRIATED LANDS.

Passed May, 1779.

Series of Land Laws. Appendix 2, 2 R. C. 1819, p. 365.

SEC. 1. Whereas there are large quantities of waste and unappropriated lands within the territory of this Commonwealth, the granting of which will encourage the migration of foreigners hither, promote population, increase the annual revenue, and create a fund for discharging the public debt: *Be it enacted by the General Assembly*, That an office shall be and is hereby constituted, for the purpose of granting lands within this Commonwealth. * * * A register of the said land office shall be appointe l, from time to time. * * *

[The foregoing act provided for the payment of the consideration for waste and unappropriated lands, obtaining warrants, directing their location, surveying the lands and issuing grants therefor. It was from time to time amended, and, with amendments, re-enacted in 1792, App. 2 R. C. 1819, p. 413, *et seq.* and again in 1819, in part, as follows:]

AN ACT TO REDUCE INTO ONE ACT, THE SEVERAL ACTS CONCERNING THE LAND OFFICE, ASCERTAINING THE TERMS AND MANNERS OF GRANTING WASTE AND UNAPPROPRIATED LANDS, DIRECTING THE MODE OF PROCESSESSIONING, AND PRESCRIBING THE DUTY OF SURVEYORS.

Passed March 1, 1819.

1 R. C. 322.

1. *Be it enacted*, That all grants of land shall issue from the land office, in manner and form hereinafter mentioned.

5. Any person may acquire title to so much waste and unappropriated lands, lying within this Commonwealth, as he shall desire to purchase, on paying the consideration of two dollars for every hundred acres, which consideration may be paid in specie, or in auditor's warrants, or audited certificates; and so in proportion for a greater or smaller quantity, and obtaining certificate from the auditor of public accounts, in the following manner: The consideration money shall be paid into the hands of the treasurer, who shall give to the purchaser a receipt for the payment, specifying the purpose it was made for; which being delivered to the auditor, he shall give to such person a certificate thereof, with the quantity of land he or she is entitled to, and upon lodging the same in the land office, the register thereof shall grant to such person or persons, his, her, or their heirs or assigns, a printed warrant, under his hand and the seal of the office, specifying the quantity of land and the rights upon which it is due, authorizing any surveyor, duly qualified according to law, to lay off and survey the same, and shall carefully file and preserve in his office all such vouchers and certificates, and shall keep a register of all warrants issued thereon, showing the number and date of each warrant, the number of acres for which each warrant shall issue, the consideration upon which the same shall be founded, and the name or names of the person or persons to whom each warrant shall issue; and shall, moreover, regularly enter and record in the books of his office, the executive certificates upon which military land warrants shall issue, which warrants shall be always good and valid, until executed by actual survey, or exchanged in the manner thereinafter directed: *Provided, always*, That no warrant shall issue to be located on any lands which may vest in the Commonwealth on account of the non-payment of the taxes thereon.

13. Where any person shall hold a warrant from the land office, or be desirous to make an entry in any county within this Commonwealth, for vacant and unappropriated land, and there shall be no surveyor qualified to act in such county, then it shall and may be

lawful for such person to make such entry with the clerk of the county court, who shall make and record the same in the entry book belonging to his county; and the same surveyed by any legal surveyor of the next neighboring county shall be good and sufficient to enable such person to obtain a patent or grant for the same.

17. Every person having a land warrant, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county, wherein the said lands or the greater part of them lie, who shall give a receipt for it, if required. The party shall direct the location thereof so specially and precisely, as that others may be enabled, with certainty, to locate other warrants, on the adjacent *residuum*; which location shall bear date the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries.

19. *Provided*, That all entries shall be void, unless surveyed within two years after their date, and the lands subject to another location.

24. Every chief surveyor swall proceed, with all practicable dispatch, to survey all lands entered for in his office, and shall, if the party live within his county, either give him personal notice of the time at which he will attend to make such survey, or shall publish sueh notice, by fixing an advertisement thereof on the door of the court-house of the county on two several court days, which time, so appointed, shall be at least one month after personal notice given, or or after the last advertisement so published; and if the surveyor shall accordingly attend, and the party, or some one for him, shall fail to appear at the time with proper chain carriers and a person to mark the lines, if necessary, his entry shall become void. * * *

30. The surveyor, at the time of making the survey, shall not leave any open lines, but shall see the same plainly bounded by marked trees (except where a water course or ancient marked line shall be the boundary) and shall make the breadth of each survey at least one-third of its length, in every part, unless where such breadth shall be restrained on both sides by mountains unfit for cultivation, by water courses, or the bounds of lands before appropriated.

31. The surveyor, as soon as it can conveniently be done, and within three months at farthest after making the survey, shall, on application, deliver to his employer, or his order, a fair and true plat and certificate of such survey. * * *

38. Every person for whom any waste or unappropriated lands shall be so located and laid off, shall, within twelve months at farthest after the survey made, return the plat and certificate of the said survey into the land office, and may demand of the register a receipt for the same; and on failing to make such return within twelve months, as aforesaid, or if the breadth of his plat be not one-third of its length, as before directed, it shall be lawful for any other person to enter a *caveat* in the land office against the issuing any grant to him. * * *

54. Due returns of the several articles hereinbefore required, being made into the land office, the register, within not less than six nor more than nine months, shall make out a grant, by way of deed poll, to the party having right. * * *

[Extract from opinion of Supreme Court of Appeals of Virginia, that the Commonwealth's grant confers seisin.] *Dawson* vs. *Watkins*, decided in 1843, 2 Rob. 268.

The Commonwealth, according to uniform course of decision, cannot be disseized of the public domain. Her estate is divested by the grant and vested in the patentee. Such grant confers title on the grantee, and therefore must confer seisin, one of the essential requisites of a complete title. Accordingly it has been uniformly held that a patent confers constructive seisin in deed, sufficient to enable the patentee to maintain his writ of right. *Clay vs. White*, 1 Mun., 162; *Green vs. Ligler*, 8 Cranch, 229; *Green vs. Watkins*, 7 Wheat, 27.

[Acts passed in a former century were re-enacted in part, as follows:]

AN ACT TO REDUCE INTO ONE ACT THE SEVERAL ACTS FOR REGULATING CONVEYANCES AND CONCERNING WRONGFUL ALIENATIONS.

[Passed February 24, 1819]

1 R. C., 1819, p. 361.

1. *Be it enacted by the General Assembly*, That no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing sealed and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her or their act,

before the court of the county, city or corporation in which the land conveyed or some part thereof lieth, or in the manner hereinafter directed, and be lodged with the clerk of such court to be there recorded.

3. When any such deed or conveyance shall be acknowledged or proved, in order to their being recorded; the livery of seisin thereupon made, in such cases where the same is by law required, shall in like manner be acknowledged or proved, and shall be recorded together with the deed or conveyance whereupon it shall be made.

[Extract from opinion of the Supreme Court of Appeals, as to the effect of the first section of the act just quoted, to avoid a deed not recorded.] *Thomas vs. Gaines, &c.*, 1 Gratt. 355.

Its comprehensive terms, "all creditors and subsequent purchasers" as well as its spirit embrace all persons who would have valid claims, in either character, to or against the property, if such deed had not been made.

[Accordingly it was decided that a deed of marriage settlement made by a woman before marriage, not recorded, was void as to subsequent purchasers from the husband.]

[Taxes constitute a lien on land.] Act passed in 1812, 2 R. C., app. 4, p. 536.

1. *Be it enacted by the General Assembly*, That the taxes due or chargeable, or hereafter to become due or chargeable, upon lands and lots within this Commonwealth, shall be and remain a lien upon the said lands and lots, until the same, with the interest thereon, shall be discharged, except in such cases as are herein provided.

Act re-enacted in 1819, 2 R. C. s. 88, p. 39.

88. No lands or lots shall be exposed for sale for any arrears of taxes and damages due thereon, except in the manner hereafter to be provided for by law; but such arrears of taxes and damages shall continue to be a lien upon the lands and lots on which they are chargeable; and the sheriff who shall be charged with the collection thereof, shall have full power and authority to collect the same, by distress or otherwise, from the owner of any such land or lot, or any tenant thereof, in the same manner as he would be authorized to collect any other taxes charged upon such land or lot.

AN ACT CONCERNING LANDS RETURNED DELINQUENT FOR NON-PAYMENT OF TAXES, AND MAKING DISPOSITION OF CERTAIN LANDS SO DELINQUENT, AND OF CERTAIN ESCHEATED LANDS, FOR THE BENEFIT OF ACTUAL AND BONA FIDE HOLDERS THEREOF UNDER GRANTS FROM THE COMMONWEALTH.

(Passed April 1st, 1831.)

Supp. R. C., p. 345.

2. And all lands, except such as shall be hereinafter excepted, returned delinquent for the non-payment of taxes thereon for the year one thousand eight hundred and twenty, or for any year or years previous thereto, and which shall not have been heretofore redeemed or otherwise exonerated from arrears of taxes thereon, in pursuance of former laws, allowing such redemption or exoneration, and prescribing the manner, terms and times thereof, or shall not be redeemed before the first day of January next, in pursuance of the provisions in this section hereinafter contained; and all lands, except such as shall be hereinafter excepted, which, after having been sold for arrears of taxes due thereon, have been redeemed by the executive, in pursuance of the act, passed the twentieth day of February, one thousand eight hundred and seventeen, entitled "an act to amend the several acts concerning arrearages of taxes on lands, houses and lots," and which shall not have been heretofore redeemed by or for the original proprietors, by payment into the treasury of the monies paid by the executive for the redemption thereof, with the damages thereon according to law, or shall not be redeemed before the first day of January next, in pursuance of the provisions in this section hereinafter contained, shall be and the same are hereby declared to be from and after the said first day of January next, absolutely forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest to and in the same, of all and every person or persons in whose name or names the same were returned delinquent for non-payment of taxes thereon, and of all and every person or persons claiming under them, shall be thenceforth, and the same are hereby absolutely vested in the president and directors of the literary fund. And further time until the said first day of January next, is hereby allowed for the redemption of all such lands in this section above mentioned, by payment into the treasury of all arrears of taxes due thereon, or of the money so advanced by the executive for the redemption thereof, as the case may be, together with damages on such arrears, or on the monies advanced by the executive, as the case

may be, according to the provisions of the former laws concerning the same, respectively.

3. And all lands, except such as shall be hereinafter excepted, returned delinquent for non-payment of taxes thereon, for any year or years subsequent to the year one thousand eight hundred and twenty, and previous to the passing of this act, and which have not been heretofore redeemed or otherwise exonerated from arrears of taxes due thereon, in pursuance of former laws allowing such redemption and exoneration, and prescribing the manner, terms and times thereof, and upon which all the arrears of taxes that have heretofore accrued, with ten *per centum per annum* damages thereon, shall not be paid into the treasury, upon warrant of the auditor of public accounts before the first day of November, which shall be in the year one thousand eight hundred and thirty-three, shall be from and after the last mentioned date, and are hereby, absolutely forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest to and in the same, of all and every person or persons in whose name or names the same are or were returned delinquent for non-payment of taxes thereon, and of all and every person or persons claiming under them, being so forfeited, shall be, from and after the last mentioned date, and are hereby, vested absolutely in the president and directors of the literary fund.

4. And in case any lands, except such as shall be hereinafter excepted, shall hereafter be returned delinquent for non-payment of taxes thereon, and the person or persons in whose name or names the same shall be so returned, or some other person for him or them shall fail for three years, to be computed from the last day of December of the year for which such taxes shall accrue and be in arrear, to pay into the treasury, upon warrant of the auditor, the amount of taxes justly due thereon and in arrear with ten *per centum per annum* damages thereon, from the date when the same accrued; all such lands so returned and remaining delinquent for non-payment of taxes shall be from and after the expiration of the said term of three years, and the same are hereby declared to be forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest in or to the same, of all and every person or persons in whose name or names the same shall be returned delinquent for non-payment of taxes due thereon, and of all and every person or persons claiming under them, being so forfeited, shall be, from and after the expiration of the said term of three years, and the same are hereby

vested absolutely in the president and directors of the literary fund: *Provided*, That in all cases of lands returned delinquent and forfeited for non-payment of taxes, and heretofore vested by law in the president and directors of the literary fund, as well as of lands which have been or shall be returned delinquent for non-payment of taxes, and which shall be, by force of the provisions of this act forfeited for that cause, and vested in the said president and directors, only such estate and interest shall be vested in the said president and directors as were or shall be vested in the person or persons in whose name or names such lands have been or shall be returned delinquent, and in the heirs, devisees or purchasers claiming under such person or persons, at the time such lands were heretofore, or by force of the provisions of this act, shall be forfeited and vested in the said president and directors. * * *

8. And whereas it is known to the general assembly that in many cases lands, or parts or parcels of lands; (especially such as have been granted and appropriated under the act passed at the May session, in the year one thousand seven hundred and seventy-nine, entitled "an act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," and the subsequent acts on the same subject,) which have heretofore been or may hereafter be returned delinquent for non-payment of taxes, and which have been heretofore vested by law in the president and directors of the literary fund, or which by the provisions of this act, shall, or may hereafter be forfeited and vested in the said president and directors, are held by persons other than those for whose default they have been or shall be so forfeited, claiming *bona fide*, mediately or immediately, under grants from the Commonwealth; and that the said actual holders and *bona fide* claimants have settled and improved the lands so by them held and claimed, and have moreover paid all public taxes thereon due and charged or justly chargeable to them; and it is therefore reasonable and just that the titles of such actual holders and *bona fide* claimants should be quieted and perfected, so far as the transfer to them of the rights vested in the said president and directors, and therefore subject to the disposition of the general assembly, can accomplish that object; *Be it therefore further enacted*, That all the right, title and interest of the said president and directors in or to any lands, except such as shall be hereinafter excepted, which have heretofore been vested by law in the said president and directors or which, by the provisions of this act, may hereafter be forfeited and

vested in the said president and directors, shall and may be, in the manner herein-after prescribed, transferred to and vested in any and every person or persons, other than those for whose default the same have been forfeited, and their heirs or devisees, who are now in actual possession and occupation of the said forfeited lands, or any part or parcel thereof, for so much thereof as such person or persons have just title or claim to, legal or equitable, *bona fide* claimed, held or derived, from or under any grant of the commonwealth, who shall have discharged all taxes duly assessed and charged against him, her or them, upon such lands, and all taxes that ought to have been assessed and charged thereon, from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable.

10. And whereas it is known to the general assembly, that in many cases divers large tracts of land have been escheated to the commonwealth for want of any known heirs of the original grantee or grantees thereof, or of persons claiming under them, and such lands, by reason of such escheat, have become vested according to law, in the president and directors of the literary fund, while at the very time of the escheat, the same lands, or parts or parcels thereof, were *bona fide* claimed, held and occupied, by numerous other persons deriving title thereto, from or under other grants of the commonwealth, and having actually settled and improved the same, and discharged all taxes charged against them upon the lands so claimed, held and occupied by them; and it is reasonable and just that the titles of such actual holders and *bona fide* claimants of lands so escheated, should be quieted and perfected, so far as the transfer to them of the rights vested in the said president and directors, and therefore subject to the disposition of the general assembly, may accomplish that object: *Be it therefore further enacted*, That all the right, title and interest of the said president and directors, in or to any lands (except such as shall be herein-after excepted,) which have been or shall hereafter be vested in them, by reason of any escheat thereof, for want of known heirs of the original grantee or grantees, or of persons claiming from or under them, shall and may be, in the manner herein-after prescribed, transferred to and vested in any and every person or persons, who were or shall be, at the time of escheat, in actual possession and occupation of the said escheated lands, or any part or parcel thereof, for so much thereof as such person or persons have just title or claim to, legal or equitable, *bona fide* claimed, held and derived, from or under any grant of the commonwealth, issued before the date of the escheat,

and who shall have discharged all taxes duly assessed against him, her or them, upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable.

11. And to the end, that a fit and certain remedy may be provided, for ascertaining the rights of any such actual holders and *bona fide* claimants as aforesaid, of the said forfeited lands, or of any part or parcel thereof, and for vesting in and assuring to them all the right, title and interest in and to the same, which have heretofore been vested by law, or which, by the provisions of this act, shall, or may be hereafter vested in the president and directors of the literary fund; and also for ascertaining the rights of such actual holders and *bona fide* claimants as aforesaid, of the said escheated lands, or any part or parcel thereof, and for vesting in and assuring to them all the right, title and interest of the said president and directors, in and to the said escheated lands: *Be it therefore further enacted*, That any such actual holder and *bona fide* claimant of any of the said forfeited lands, or of any of the said escheated lands, or of any part or parcel of either, may prefer his petition to the superior court of chancery, having jurisdiction over the county, wherein the said forfeited or escheated lands, or the parcel of the same held and claimed by the petitioner, or the greater part thereof, may lie; setting forth, specially and precisely, all the facts, which, in the opinion of such petitioner, entitle, him, according to the provisions of this act herein above contained, to have the right, title and interest of the said president and directors, in or to the said forfeited lands, or the said escheated lands, (as the case may be,) or any part or parcel of either, transferred to and vested in the said petitioner, in pursuance of the provisions of this act; stating and deducing his own right or title, legal or equitable, to the land by him claimed and held, exhibiting the documentary evidence of such his right and title. and showing the local situation and quantity of the land by him claimed and held; specifying also, so far as the same are known, the person or persons, in whose name or names the lands held and claimed by him, stand forfeited for non-payment of taxes, or escheated, in manner aforesaid, or, if the lands shall have been forfeited for more than one delinquency, or escheated in more than one right, the several delinquencies for which forfeitures shall have been incurred, or the several rights escheated, as the case may be; finally, setting forth any other matters, which the petitioner may deem material to his case; and praying the court to decree that all

the right, title and interest of the said president and directors, in or to the lands claimed and held by him, shall be transferred to and vested in the petitioner.

21. If any person having title to any tract or lot of land, or any part thereof, returned delinquent for the non-payment of taxes, and not heretofore vested in the president and directors of the literary fund, and having, or whose tenant or lessee having legal possession thereof, shall prove by satisfactory evidence, to the court of the county or corporation in which such land or lot may lie, before the first day of January, one thousand eight hundred and thirty-three, that prior to the passage of this act, he was a *bona fide* purchaser of such land or lot, or of the part thereof so claimed by him; that he has a deed for the same, which was duly recorded before the passage of this act; and that he has paid all the purchase money therefor, or so much thereof as not to leave in his hands sufficient to satisfy and pay the taxes and damages in arrear and unpaid at the date of his purchase, or that he fairly derives the title by, through or under some person so having purchased and paid the purchase money, it shall be the duty of the court to render judgment in favour of such person exonerating the land or lot, or the part thereof so claimed or derived, from all arrears of taxes, and the damages thereon anterior to the date of such purchase, except so much as the balance of the purchase money remaining unpaid, will be sufficient to discharge; and the complainant may take a copy of the record, attested by the clerk, and file the same with the first auditor, who shall correct the delinquent lists in his office accordingly; bnt no judgment shall be rendered, except in the presence of the attorney for the commonwealth, or some other attorney appointed by the court to defend the interest of the commonwealth. If the application shall fail, judgment shall be rendered against the applicant, and he shall be adjudged to pay costs. No judgment in favour of such applicant shall be of any validity, unless it appear on the record that the attorney for the commonwealth, or the attorney appointed as aforesaid, appeared to defend the application.

[Act relinquishing taxes not exceeding ten dollars, and providing for transfer of title forfeited without judicial proceeding.] Passed 10th March, 1832, Supp. R. C., p. 352.

2. *Be it further enacted*, That the taxes and damages due and chargeable upon lands and lots lying in any of the counties of this

commonwealth, west of the Alleghany mountains, returned delinquent for the non-payment of taxes thereon for the year one thousand eight hundred and thirty-one, or for any year or years prior thereto, and which shall not have been heretofore redeemed or exonerated from arrears of taxes thereon, in pursuance of former laws, allowing such redemption and exoneration, and prescribing the manner, terms and times thereof, if the amount of taxes, exclusive of damages, charged upon any tract or lot of land so returned delinqnent, shall not exceed ten dollars, shall be, and the same are hereby relinquished, and the *lien* held by the commonwealth or literary fund upon such delinquent lands or lots, forever discharged. And as to all lands and lots so lying west of the Alleghany mountains, returned delinquent for the non-payment of taxes thereon, upon which the taxes, exclusive of damages, shall exceed the said sum of ten dollars, for the year one thousand eight hundred and thirty-one, and for each and every year prior thereto, added together, the provisions of the several acts now existing, shall remain and continue in full force; and all such lands and lots, which by the provisions of the act, entitled, "an act concerning lands returned delinquent for non-payment of taxes, and making disposition of certain lands so delinquent, and of certain escheated lands, for the benefit of actual and *bona fide* holders thereof, under grants from the commonwealth," passed on the first day of April, one thousand eight hundred and thirty-one, might be transferred to and vested in the actual and *bona fide* holders thereof, claiming under grants from the commonwealth, shall be, and the same are hereby declared to be absolutely vested in such holders, and as to those not yet forfeited, immediately after the forfeiture of any such lands or lots shall accrue to the commonwealth by force of the provisions of said act or any act amending the same; and such actual and *bona fide* holder, in any action brought against him for the recovery of such land, shall have the full benefit of the commonwealth's right hereby intended to be transferred to him: *Provided*, That nothing in this act shall be so construed as to impair the right or title of any person or persons who have obtained grants for the same land, and have regularly paid the taxes thereon; but in all such cases the parties shall be left to the strength of their original titles.

[Act requiring omitted lands to be charged with taxes and forfeiting them for the failure to do so, and transferring the title to persons holding or claiming under titles or claims *bona fide* held or derived under grants from the Commonwealth.] Passed 27th February, 1835.

And whereas it is known to the general assembly that many large tracts of land lying west of the Alleghany mountains which were granted by the Commonwealth before the first day of April, eighteen hundred and thirty-one, never were, or have not been for many years last past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for non-payment of taxes has occurred, or can accrue, under the existing laws, the Commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

2. *Be it therefore further enacted*, That each and every owner or proprietor of any such tract or parcel of land shall on or before the first day of July, eighteen hundred and thirty-six, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through title derived mediately or immediately under grants from the commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself or his tenant in possession, shall become forfeited to the Commonwealth, after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted.

3. *Be it further enacted*, That all right, title and interest which may hereafter be vested in the Commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and absolutely vested in any and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable, *bona fide* claimed, held or derived from or under any grant of the Commonwealth, bearing date previous to the first day of April, eighteen hundred and thirty-one, who shall have discharged all taxes duly assessed and charged against him, her or them upon such lands, and all taxes that ought

to have been assessed and charged thereon from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable: *Provided*, That nothing in this section contained shall be so construed as to impair the right or title of any person or persons who have obtained grants from the Commonwealth for the same land, and have regularly paid the taxes thereon, but in all such cases the parties shall be left to the strength of their original titles.

[Act transferring title forfeited to holders under grants from the Commonwealth issued before or after the act, though not in possession, who paid the taxes charged and chargeable to them thereon.] Passed March 5, 1846—Acts 1845-6, p. 14.

3. *Be it further enacted*, That all right, title and interest which have or shall hereafter be vested in the Commonwealth, in any lands or lots lying west of the Alleghany mountains, by reason of the non-payment of taxes heretofore due thereon, or which may hereafter become due thereon, or for the failure of the owner or owners thereof, to cause the same to be entered on the books of the commissioner of the proper counties, and to have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore passed in reference to delinquent and omitted lands, shall be and the same are hereby absolutely transferred to and vested in any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees,) for so much as such person or persons may have just title or claim to, held or derived from or under grants from the Commonwealth, heretofore or herafter to be issued, who shall have paid all taxes duly assessed and charged against him or them on such lands, and all taxes that ought to have been assessed and charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: *Provided*, That nothing in this section contained shall be construed to impair the right or title, legal or equitable, of any person or persons who shall *bona fide* claim said land by title, legal or equitable, derived from the Commonwealth, on which the taxes have been fully paid up according to law; but in all such cases the parties shall be left to the strength of their titles respectively.

[Chapter transferring the Commonwealth's title to lands forfeited, and authorizing the entry, survey and grant of such lands.] Code of 1849, p. 495.

1. All right, title and interest heretofore vested in the Common-

wealth, or in the president and directors of the literary fund, in any lands, by reason of forfeiture for the non-payment of taxes thereon for eighteen hundred and thirty-one, or any year previous thereto, or for the failure of the owners thereof to have the same entered on the books of the commissioners of the proper counties and charged with such taxes, are hereby transferred to and vested in any persons (other than those for whose default the same may have been forfeited, and their heirs or devisees,) for so much as such persons may have just title or claim to, from or under grants of the Commonwealth, issued heretofore or hereafter upon surveys heretofore made, and who, from the time of such title or claim, shall have paid all taxes duly assessed against them on such lands, and all taxes that ought to have been assessed thereon.

3. So much of any such lands as may not have been redeemed by the former owners, or sold by the Commonwealth as forfeited lands, by virtue of any act heretofore passed, nor vested in any *bona fide* claimant in pursuance of the preceding section, shall be liable to entry, survey and grant, in the same manner as waste and unappropriated land.

[Acts that show the sense of the Legislature, that the title to land forfeited should be transferred only to persons having a connected claim of title regularly derived from the Commonwealth.] Acts 1857–8, p. 43.

1. *Be it enacted by the General Assembly*, as follows: When any land lying west of the Alleghany mountains has been escheated, or become escheatable, and five years since the same was escheated or became escheatable, have already transpired without a sale thereof by an escheator, all the title, right or interest of the commonwealth, or of the president and directors of the literary fund or of the board of the literary fund, to, or in such land, is hereby now, without inquest or other proceeding, absolutely transferred to, and completely vested in any person claiming the same under a grant from the commonwealth heretofore issued, other than that under which the title so escheated or escheatable was held; or under a survey or entry heretofore made, upon which a grant has not issued, who, but for an older grant than the grant, survey or entry under which he claims such land, would have just title or right, legal or equitable, thereto, and with those, if any, through whom he claims such land, has paid all the taxes, if any, which have, or ought to have been assessed against him or them on such land, and when any such land has or shall have hereafter been

escheated or become escheatable, and five years next after the same was escheated or became escheatable shall have thereafter transpired without such sale, all such title, right or interest to or in such land shall be hereby, at the expiration of such five years without inquest or other proceeding, absolutely transferred to, and completely vested in any person claiming the same under a grant from the commonwealth heretofore issued or hereafter issued upon a survey or entry heretofore made other than that under which the title so escheated or escheatable was held, or under a survey or entry heretofore made upon which a grant has not issued, who, but for an older grant than the grant, survey or entry under which he claims such land, would have just title or right, legal or equitable, thereto, and with those, if any, through whom he claims such land, has paid all the taxes, if any, which have, or ought to have been assessed against him or them on such land. If such person so claiming any such land under a survey or entry upon which a grant has not issued, so fail or delay to obtain such grant, as, if such land were subject to entry, to terminate his right thereto, any title, right or interest hereby transferred to him, shall thereupon be divested, and revested in the commonwealth. Whenever by the terms hereof, any title, right or interest to, or in any land, might be transferred to different persons claiming the same under different grants, surveys or entries, such title, right or interest is or shall be transferred to and vested in such person of them, as if there had been no other grant, survey or entry than those under which they claim such land. would have just title or right, legal or equitable, thereto.

[In 1860 this act was re-enacted, extending it to a larger territory.] Code, Ed. 1860, Chap. 114, p. 310

Code of W. Va. of 1868, Ch. 31, s. 34, p. 199.

All the estate. title, right and interest which has vested or shall vest in this state or become irredeemable under the said chapter or shall be forfeited under this act. shall be hereby transferred to and vested in any person (other than those for whose default the same may have been returned delinquent or forfeited, their heirs or devisees) for so much thereof as such person may have title or claim to, regularly derived, mediately or immediately, from or under any grant from the commonwealth of Virginia, or this state, who, together with those, if any, through or under whom he claims, shall have paid or shall pay all the State taxes charged thereon against him or them from the date

of such grant, and all the state taxes which, if such title or claim had been valid, ought to have been charged thereon against him or them, from the date of such grant, or for the year eighteen hundred and sixty-three, and subsequent years before this year, and all such state and county taxes for this year; and when such real estate shall not become irredeemable or forfeited the year 1869, then such taxes for any subsequent year or years, till it become redeemable and the payment be made. Such payment may be made at any time before the real estate is sold for the benefit of the school fund. When more than one person shall have such title or claim and shall have paid such taxes, such estate, title, right or interest, shall vest in him whose title or claim, but for another, would be the valid title.

[Extract from opinion of the Supreme Court of Appeals of Virginia, that laws relating to the same subject should be construed as intended to promote the same policy.] *Fox's adms. vs. Commonwealth* decided in 1860, 16 Gratt., 1[illegible].

As one part of a statute is properly called in to help the construction of another part, and is fitly so expounded as to support and give effect, if possible, to the whole, so is the comparison of one law with other laws made by the same legislator, or upon the same subject, or relating expressly to the same point, enjoined for the same reason and attended with a like advantage. In applying the maxims of interpretation, the object is, throughout, first to ascertain, and next to carry into effect the intentions of the framer. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is, therefore, an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law: and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view. And the rule, it is said, equally applies, though some of the statutes may have expired, or are not referred to in the others. Id. 699, 700.

[Extracts from opinions of the Supreme Court of Appeals, to show that the Court has considered the statutes of this character as transferring the title of lands forfeited, not to the former owners for whose default it was forfeited, but to claimants having apparent titles under collateral grants, regularly derived from the commonwealth.]

Wild's lessee vs. *Serpell*, decided in 1853. 10 Gratt. 408, 412.

That the provisions of our statutes passed from time to time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and where they have been omitted from the books of the commissioners of the revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages as shall be found not to be released by law; and in case of failure so to do, forfeiting to the commonwealth all right and title whatever of the parties in default, (under the modifications and restrictions provided by the acts.) are within the constitutional competency of the legislature, has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. *Staats' lessee* vs. *Board, supra* 400; *Smith's lessee* vs. *Chapman, infra; Hale* vs. *Branscum, infra.* The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such case, no judgment or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves, of their own force and by their own energy, work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the commonwealth without the machinery of any proceeding of record, or anything in the nature of an inquest of office. And as the title is thus in a proper case divested out of the owner and vested in the commonwealth by the operation of the statutes, so where the forfeiture enures to the benefit of a third person claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person is in like manner perfect and complete without any new grant from the commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these subjects I have nothing therefore to say upon this occasion, except that considering the peculiar condition of things in that part of the state lying west of the Alleghany mountains, and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable.

In this case, the tract of three hundred acres granted to Francis and William Deakins in December 1785, having never been entered upon the books of the commissioners of the revenue in any county, nor charged with taxes according to law prior to the year 1839, was therefore clearly forfeited to the commonwealth under the second

section of the act of February 27th, 1835. Sess. Acts 1834-5, p. 12. And this forfeiture became perfect and consummate on the 1st of November, 1836, at which period the further time given by the act of March 23d, 1836, Sess. Acts 1835-6, p. 7, within which the owners of delinquent and omitted lands might save a forfeiture by complying with the provisions of the act, expired by express limitation. For although by subsequent acts, the owner might have redeemed any forfeited land by complying with the provisions of the act at any time prior to the 1st of July, 1838, (at which the ultimate period of redemption provided by law expired,) yet that day was suffered to pass by without any effort to redeem this land on the part of those claiming title to it. The only questions then to be considered are, 1st, whether the plaintiff was at any time before the institution of his suit, in a condition to claim the benefit of the forfeiture of the Deakins title, and so to weld the same to the junior and defective title conferred by the commonwealth's grant to him in 1836, as to enable him to recover against the purchaser (or those claiming under him,) at the sale of the land, as forfeited, by the commissioner under the decree of the Circuit Court of Preston. * * *

It is clear that under the provisions of the act of February 27th, 1835, the plaintiff can claim no benefit of the forfeiture of the Deakins title; because by the express terms of that act a forfeiture only enured to the benefit of those who claimed title under a grant from the commonwealth bearing date previous to the 1st of April, 1831. Neither can he sustain such a claim under the provisions of the act of March 30th, 1837; because the saving clause in the first section of that act only provides for *bona fide* occupants claiming under prior grants, whose rights were protected and secured under the provisions of the several acts theretofore passed on the same subject and then still in force. Nor could the plaintiff make good his claim under the sixteenth section of the act of March 16th, 1838, Sess. Acts 1837-8, p. 21; because the transfers of title vested in the commonwealth by forfeiture, declared and provided by that act, are confined to the cases of persons at the date of the act in the actual possession and occupancy of the lands forfeited, or parcel thereof, with title *bona fide*, claimed or derived under grants from the commonwealth which issued subsequent to the 31st day of March, 1831, and prior to the 15th of January, 1838; and the case agreed here is silent as to the *bona fides* of the plaintiff's claim. It may be doubted, too, perhaps, whether under the particular terms of that section the right to set up such a transfer of title is not restricted to the purpose of

defence by the occupant against whom an action might be brought for the recovery of the land then in his possession. And I think the plaintiff cannot bring himself within the provisions of the act of March 18th, 1841, Sess. Acts 1840-41, p 31, because under them the forfeiture is made to enure to the benefit of those then in actual possession of the forfeited land under claim of title through a grant from the commonwealth. And although the lessor of the plaintiff was in fact in possession of this land at the date of the act last mentioned, yet his possession was not under his own grant but as the tenant of Hoye; and thus he was not within the condition of the transfer prescribed by the act. But I think the act of March 22d, 1842, Sess. Acts 1841-2, p. 13, fully covers the case. By the third section of that act the title to forfeited lands is transferred to and vested in such persons (other than those for whose default the same may have been forfeited,) as had title or claim, legal or equitable, derived under a grant from the commonwealth bearing date prior to the 1st of January, 1843, without making actual occupancy or possession of the land any part of the condition on which the transfer of the title takes effect; and the qualification of a *bona fide* claim of title is in like manner omitted. At the date of this act the lessor of the plaintiff was clearly in the category which it described. The Deakins title had been forfeited and was then vested in the commonwealth, and he had a junior grant for a portion of the land, and had had it duly assessed, and had paid all taxes charged and properly chargeable on the same. There was nothing then to prevent this act from transferring to him the Deakins title to the land embraced within his grant, (or so much of it as lay within the Deakins grant,) unless it be that before the passage of that act, the land granted by the patent to Deakins had been reported to the Circuit Court as forfeited, and an order made, (on the 7th of September, 1841,) directing it to be sold as such by the commissioner of delinquent and forfeited lands. But I do not see why this should prevent the operation of the act. No sale had yet taken place under the order; no right had been acquired by any other person; and the title was still in the commonwealth and fully within the control of the legislature. It was as competent in that body to transfer the title to forfeited land from the commonwealth to a claimant under a distinct grant from her, as well after an order of sale as before, provided it were done before any new right was acquired by an actual sale being made under it. And every reason which could operate with the legislature to induce it to make

such a transfer before the land had been directed to be sold, would apply with equal force, though it might have chanced that such an order had been made. * * * *

Levasser vs. *Washburn*, decided in 1854, 11 Gratt. 581–2.

By the second section of the act of April 1, 1831, certain delinquent lands * * * were declared to be forfeited. * * * The eighth, ninth and tenth sections of the same act provide for transferring the title to certain forfeited and escheated lands to persons in possession under other grants in certain cases; and by the eleventh section a mode is provided by which the occupant is to obtain a decree on petition to the proper court, investing him with the title. But by the act of March 10th, 1832, this proceeding is dispensed with, and the title immediately vested by the operation of the act.

[Act relinquishing commonwealths' title to lands settled more than thirty years, on which taxes have been paid, with provision that it should not apply to forfeited lands.] 1 R. C. p. 330.

40. No entry or location on any lands within this commonwealth, which have been settled thirty years prior to the date of such entry or location, and upon which quit rents or taxes can be proved to have been paid at any time within the said thirty years, shall be deemed valid; and any title which the commonwealth may be supposed to have thereto, is hereby relinquished; and any person in possession of such land, and claiming the same under such settlement and payment, may have said land surveyed, and on producing before the court of the county where the land, or the greater part thereof may lie, satisfactory evidence of such settlement and payment, may have the plat and certificate of survey, together with such evidence, entered of record; and such record shall be *prima facie* evidence in any subsequent controversy, which may arise, with any person claiming under a location made after such admission to record: *Provided*, That this provision shall not extend to the case of any entry or location regularly made according to law, previous to the twenty-fourth day of January, in the year seventeen hundred and ninety-eight; nor shall it be so construed as to affect the right of this Commonwealth, in or to any lands or tenements, forfeited by non-payment of the Commonwealth's taxes, or to alter or change the construction of the act of limitations of real actions.

[In the Code of 1849, ch. 112, s. 36, p. 484–5, the time is reduced to twenty years; but the provision is retained, that the law shall not apply to lands forfeited.]

[Acts limiting the time within which writ of right and action of ejectment may be brought.]

Act passed in 1831, Sup. R. C. p. 262.

2. In all writs of right, and other actions possessory, any person may maintain a writ of right or any other possessory action upon the possession or seisin of his or her ancestor or predecessor, within twenty-five years, next before the *teste* of the writ; but no person shall maintain a real action upon his own possession or seisin, but within twenty years next before the *teste* of the writ: *Provided*, That if any person, who is or shall be entitled to any real action upon his or her own seisin or possession, were or shall be under the age of twenty-one years, *feme covert*, imprisoned, or *non compos mentis*, at the time such action accrued, or shall accrue, every such person shall and may, notwithstanding the said twenty years are or shall be expired, bring and maintain such real action within five years after such disabilities removed, and not afterwards.

[By the act passed in 1837, Acts of 1836–7, p. 12, s. 11, in writs to recover land west of the Alleghany mountains, the time within which a person may maintain the writ on the seisin of his ancestor is reduced to eighteen years; on his own seisin fourteen years.]

[In the Code of 1849 are the following provisions.]

Chap. 135, p. 558.

2. The action of ejectment may be brought in the same cases in which a writ of right may now be brought.

Chap. 149, p. 594.

19. No action, suit, *scire facias*, or other proceeding, which may be pending on the day before the commencement of this act, or the right to prosecute which, under the laws in force on that day, shall have accrued before that day, shall be barred by this chapter, any farther or otherwise than as follows: the same, if pending on that day, shall be subject to such limitation as it would have been subject to if this act had not passed; and where not so pending, if the right to prosecute the same shall exist on that day, for a certain number of

years prescribed by any statute, the same or such other action as may be substituted therefor by this act, may be prosecuted within such time as the same might have been prosecuted if this chapter had not been enacted, and not after. * * *

[Extracts from decisions of the Supreme Court of Appeals, that mere acts of ownership are not possession, but that actual occupancy by a wrong-doer, or its equivalent, is necessary to oust and keep out the rightful owner of land ; and this must be within the interlock of the respective claims.]

Taylor's devisees vs. Burnsides, decided in 1844, 1 Gratt. 188, 9, 90, 5, 6, 206, 7.

Thus, in regard to the right of entry, and consequently the action of ejectment, though the statute prohibits an entry after the lapse of fifteen years from the time that the right or title has accrued ; yet an entry may be made, or an action of ejectment, brought, at any distance of time, if a good title can be shewn ; unless the other party can prove a continued adversary possession for fifteen years. * *

So, in regard to the writ of right, though the statute bars the remedy, where there has not been seisin or possession of the demandant himself for twenty years, or of the demandant and his ancestors, or predecessors for twenty-five years ; yet if the demandant shews a good title, such want of seisin or possession must arise from a continued adverse possession, during such respective periods of time. This is generally true in *England*, when the mise is joined upon the mere right ; and it is universally true in *Virginia*, whatever may be the form of pleading. Here an actual seisin by taking the esplees or profits, is never necessary to maintain a writ of right, the constructive seisin furnished by the better title derived from the government being all sufficient. Such constructive seisin may be excluded by an adversary possession ; but so soon as the adversary possession ceases, the constructive seisin incident to the better title is renewed. Hence the uniform necessity of a continued adversary possession to bar a writ of right, as well as an action of ejectment, and for a longer period of time.

The effect of these statutes is to render a continued adversary possession, for a snfficient iength of time, conclusive in the action of ejectment, against the right of possession ; and in the writ of right, against the right of property. This result is so absolute, that such adversary possession is not onlya sufficient defence on the part of the defendant or tenant ; but where it has ex'sted on the part of the

defendant or demandant, is a sufficient ground for recovery, against the strongest proof of better title.

The inexorable operation of these statutes, disregarding as they do entirely the original merits of the controversy, furnishes a sufficient reason for excluding mere presumptions of the facts which they require, and for exacting clear and decisive proofs of their existence. When such proofs are furnished, the enactments should receive a fair and liberal interpretation.

When we look to the elements of an adversary possession, in reference to conflicting claims, and the statutory prescriptive bar, we find it to consist of an exclusive, actual, continued possession, under a colorable claim of title.

It must be exclusive.

An adversary possession must be actual, as contrasted with a constructive possession. * * * I understand an actual possession to be the occupation, use or enjoyment of the subject matter of controversy, by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership. * * * That acts of ownership on the property indicate an adverse claim, is not, as I humbly conceive, sufficient, unless they amount to an adverse possession, that is, to the occupation, use or enjoyment of the premises. Nor is it sufficient that they shew a continued claim of the party, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. * * *

If the junior patentee settles within the boundaries of his grant, but outside those of the older patent, in such case, I think, he gains thereby no actual possession of the land in controversy, whether the possession of the older patentee be actual or constructive only. For though where there is no controversy, the rule that possession of part is possession of the whole, is to be taken in reference to the entire tract; yet where there is a conflict of titles, it is to be taken in reference to such conflict. And without actual possession of some part of the land in controversy, the junior patentee can gain no possession of the subject against the better right of the older patentee. This, I consider, perfectly just and reasonable; for otherwise the lawful owner might be disseized not only without his knowledge, but without the means of acquiring it.

It follows from what has been said, that wild and uncultivated lands cannot be made the subjects of adversary possession, while they remain completely in a state of nature. A change in their condition,

to some extent, is therefore essential ; and the acts by which it is effected are often the strongest evidence of actual possession. Without such change, accomplished or in progress, there can be no residence, cultivation or improvement ; no occupation, use or enjoyment. Evidence short of this may prove an adversary claim ; but, in the nature of things, cannot establish an adversary possession. Nor is there any reason for relaxing the rules of law on this subject, in behalf of the adversary claimant of such property. There ought to be no presumption in his favor against the better title. It is in vain for him to say that he has had all the possession of which the property was then susceptible ; for that would lead to a constructive possession, which is only attributable to the rightful owner.

An adversary claim merely, however open and notorious, and whether on or off the premises, does not give an actual possession. It does not shew an occupation, use or enjoyment of the premises. In truth, an adverse claim seems here to have been confounded with an adverse possession. A continual claim is a remedy which the law, in some cases, gives to the true owner, to preserve his right of entry ; but upon what principle can it be regarded as conferring actual possession upon him who has no title? Payment of taxes, prohibition of trespasses, surveys of the land, sales and conveyances of it ; though they may serve to shew a claim of title, are not evidence of actual possession. *Jackson* v. *Myers*, 3 Johns, R. 383 ; *Dawson* v. *Watkins*, 2 Rob. R. 259 ; Tillinghast's Adams on Eject. 43, n. Even the cutting and selling of timber by the tenant himself, or by his authority, is but a transient trespass, unless habitual : Tillinghast's Adams on Eject. 493, appendix. * * *

It is enough that possession be evidenced by actual occupation, or what is equivalent to it ; and less than this is not enough.

Royner vs. *Rankin's heirs*, decided in 1854, 11 Gratt. 427-8.

The case is one of two patents conflicting in part, occasioning what is called a "lap" or "interlock." The elder patentee under his grant acquires at once constructive seisin in deed of all land embraced within its boundaries, although he has taken no actual possession of any part thereof. *Clay* v. *White*, 1 Munf. 162 ; *Green* v. *Liter*, 8 Cranch's R. 229. The junior patentee under his grant acquires similar constructive seisin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seisin of which had already vested in the senior patentee. *Clark's lessee* v. *Courtney*, 5 Peters' R. 318, 354 ; *Langdon* v. *Potter*, 3 Mass. R. 215.

But if his settlement be outside of the interlock, there the possession of part is to be construed in reference to the conflict of boundaries, and with whatever claim it be taken, it gives him possession of that part of the land, only, lying without the interlock. Of that within, he does not thereby acquire the possession. The constructive possession which he would have gained if there had been no conflict, does not take effect; and there is nothing which can serve to overcome the constructive seizin in deed of the elder patentee, and work an ouster. To effect this, there must be an actual invasion of the boundary of the senior patentee, by some act or acts palpable to the senses, and which would serve to admonish him that his seizin was molested. He is of course presumed to know his own boundary, and if that be invaded by plain, open, visible acts of possession on the part of the other, and he submits or fails to assert his right, an ouster will be accomplished, and he shall be said to be disseized. But if the acts be not of the character above indicated, if they amount to a mere adverse claim, however connected with possession of another part of the land, they will not have that effect. The consequence of a different rule, as justly remarked by Judge Baldwin in *Taylor* v. *Burnsides*, 1 Gratt 165, 196, would be that a man might be disseized of his freehold not only without his knowledge but even without the possibility of his knowing it. See also *Buford* v. *Cox*, 5 J. J. Marsh. R. 589.

[Extract from opinions of the Court of Appeals, that possestion did not confer the commonwealth's title otherwise than under the operation of the statute for its relinquishment, ~~and did not effect the statute for its relinquishment~~, and did not effect the title of the commonwealth or her grantee to forfeited lands.]

Gore vs. *Lawson and others*, decided in 1836, 8 Leigh 462, 3, 5, 6-7.

Brokenborough, J.

No time runs against the commonwealth unless when the Legislature has thought proper to allow it. By the act of 1798, it is enacted that where the lands have been *settled* for thirty years, and the taxes have been paid thereon within that period, no entry or location thereon shall be valid, and the Commonwealth's right to such land is thereby relinquished. But there is nothing in the case to show that the defendants had *settled* on the twenty acre lot thirty years before the plaintiff's entry and location, and paid the taxes; and of course that act did not apply to the case.

CARR, J.—That no persan can claim adversely against the commonwealth (under whom all claim) I consider a truism. Thirty years possession in deed, and the payment of taxes, will give a good title, but this is because the law has so willed it. A law to that effect was necessary.

CABELL, J. It is a maxim that no time runs against the commonwealth; and the necessary consequence of this is, that no length of possession, however adverse, can bar or affect her rights. She may therefore grant her title to any other person, and the lands in the hands of the grantee will be as unaffected by the previous possession of the person claiming under an invalid title, as it was in the hands of the commonwealth. To suppose the contrary, would be to advance the absurdity, that the commonwealth may have a perfect title to land, without the power of transferring it.

TUCKER, P. I am of opinion that no possession of waste and ungranted lands anteriour to the emanation of a patent from the commonwealth, can be set up as an adverse possession against the commonwealth, or against a subsequent patentee duly entering and obtaining a grant for the lands. No possession of ungranted lands can be adverse to the commonwealth, because no person in the commonwealth can hold except under her; and thus we must suppose the person as holding adversely to the only authority that can give title to the lands, without having obtained a title from that authority. Moreover, it is a well settled principle that no time runs against the commonwealth, so that in this case there could have been no adverse possasiion, and no running of the statute, until the patent issued in 1830. Of course it operated no bar.

It is contended, indeed, that after the patent issued, the patentee should be taken to be barred by relation to the commencement of the possession of the defendants and those they hold under. Such a doctrine is now for the first time heard of. It is unsustained by authority. It is in conflict with the just and received notion that the grantee succeeds to the rights of the grantor, and may avail himself of those protections which would have been effectual for him. It would go to this, that the commonwealth, though she had a geod title, could not confer one, and that the tenant, though he had no title at all before, acquired a good title by the emanation of a patent to his *adversary*. And lastly, it would as completely defeat the rights of the commonwealth, as if the well seitled principles above mentioned had never been introduced for her protection. For admit that though the possession of a squatter on ungranted lands shall not be held adverse

to the commonwealth, and shall by no length of time bar *her* rights, such possession may yet be brought to bear upon a subsequent patentee, and the effect would be that no person would venture to take up such lands, and the commonwealth would thus be defrauded of their value. The position therefore cannot be sustained by the court.

Levasser vs. *Washburn*, decided in 1854, 11 Gratt. 576–9.

It is a maxim of great antiquity in the English law, that no time runs against the Crown, or as it is expressed in the early law writers, "*nullum tempus occurie regi.*" *Magdalen College case*, 11 Coke 68–74; *S. C.* 1 Roll. R. 151; Bracton lib. 2 ch. 5, § 7; Britton, ch. 18, p. 29; 8 Bac. Abr. "Prerogative," E, p. 95; 7 Comy. Dig. "Prerog." D, 86, p. 90. And it may be laid down as a safe proposition, that no statute of limitations has been held to apply to suits by the crown, unless there has been an express provision including it. *United States* v. *Hoar*, 2 Mason's R. 311.

The reason sometimes assigned why no laches shall be imputed to the king is, that he is continually busied for the public good, and has not leisure to assert his right within the period limited to subjects. Coke Litt. 90; 1 Black. Com. 248. A better reason is, the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. *Sheffield* v. *Ratcliffe*. Hob. R. 347; *United States* v. *Hoar*, 2 Mason's R. 311; *The People* v. *Gilbert*, 18 John. R. 227; *United States* v. *Kirppatrick*, 9 Wheat. R. 720–735. This reason certainly is equally, if not more, cogent in a representative government, where the power of the people is delegated to others, and must be exercised by these if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country when they succeed to the rights of the king of Great Britain, and formed independent goverements within the respective states. *Inhab. of Stoughton* v. *Baker*, 4 Mass. 522; *The People* v. *Gilbert*, 18 John. R. 227; *Kemp Commonwealth*, 1 Hen. & Munf. 85; *Nimmo's ex'or* v. *Commonwealth*, 4 Hen. & Munf. 57; *Chiles* v. *Calk*, 4 Bibb's C. 554; *Commonwealth* v. *McGowan*, Ibid. 62. And though it has been sometimes called a prerogative right, it is in fact nothing more than an exception or reservation introduced for the public benefit, and equally applicable to all governments. Per Story, J., *United States* v. *Hoar*, *ubi supra*.

Independently of the particular reason above referred to, anotner has been advanced, founded on the presumed legislative intention. In general, legislative acts are intended to regulate the acts and rights

of citizens; and it is a rule of construction not to embrace the government or effect its rights by the general rules of a statute unless it be expressly and in terms included or by necessary and unavoidable implication *United States* v. *Hoar, ubi supra; People* v. *Gilbert*, 18 John. R. 227.

This exception from the imputation of laches and the operation of the statutes of limitation is not confined to debts and demands of a personal nature in favor of the sovereign but extends also to lands and real estate held *jure coronæ*. Bracton, lib. 3, ch. 3, p. 103; *Lee* v. *Norris*, Cro. Eliz. 331; *Chites* v. *Calk*, 4 Bibb's R. 554; *Johnson* v. *Irwin*, 3 Serg. & Raw. R. 281. And accordingly we find it treated as a settled maxim, that there can be no adversary possession of lands against the commonwealth, and that no time will bar her recovery, or that of her grantee, against the party holding, except only in the solitary case specially provided by statute, of a settlement of thirty years accompanied by payment of taxes or quit rents within that time. *Gore* v. *Lawson*, 8 Leigh 458; *Tichanal* v. *Roe*, 2 Rob. R. 288; *Shanks* v. *Lancaster*, 5 Gratt. 110. See also *Ward* v. *Bartholomew*, 6 Pick. R. 409.

But though the general rule will not be controverted, it may be said that it will not apply in the case of a forfeiture of lands to the commonwealth for failure of the owner to comply with her revenue laws, where an adversary possession had been commenced against the former owner before the forreiture.

It is true, in a certain sense, the commonwealth takes the land on forfeiture in the same plight and condition in which it stood at the time of the forfeiture. The commonwealth takes the estate and title of the former owner, and no other. If at the time of the forteiture his title were absolutely bound by the adversary possession of another, it may be no title would vest in the commonwealth, unless it were saved by the existence of her lien on the land for arrears of taxes; a point upon which I express no opinion. But if when the forfeiture accrued the right of entry still remained to the owner, though an adversary possession had been commenced, the possession as to her must lose its adversary character, and she must take and hold the subject with the same rights, privaleges and immnnities which pertain to any other lands held by her in demesne.

I can perceive no good reason why any discrimination should be made, or why she should hold forfeited lands upon different principles and with diminished privileges from those applying to other sub-

jects of similar character. Certainly, the reason for exemption from the effects of laches and inattention on the part of her public officers, is as cogent in such a case as in any other whatever. Nor have I seen any case, so far as my investigation has extended, which warrants any such distinction. The case of *Hall* v. *Giltings*, 2 Har. & John. 112, fully supports the contrary doctrine. In that case certain lands, which had escheated to the lord proprietary (under grant of the English crown) were confiscated to and vested in the state of Maryland under the act of October, 1780, ch. 40, without office found or actual entry. Prior to the confiscation, adversary possession of the land had been taken and was held against the proprietary. Yet it was held that upon the passage of the act of confiscation, such possession ceased to operate against the state during the time the title was vested in her, and that the defendant could not, upon the strength of such possession. resist the right of her subsequent grantee to recover. See also *Harlock* v. *Jackson*, 1 Constit. R. (S. C.) 135.

Usher's heirs v. *Pride*, decided in 1858, 15 Gratt. 201.

The land being forfeited and actually vested in the Literary Fund, the possession of the plaintiffs, after such forfeiture, gave them no rights as against the Commonwealth.

[Extracts from opinions of the Supreme Court of Appeals, as to the policy of the General Assembly in the provisions adopted for the sale of lands for taxes, and their effect.]

Flanagan v. *Grimmett et. als.*, decided in 1853, 10 Gratt., 425, 429, 434-5, 6, 7, 8, 41.

The propriety of this decision depends upon the provisions of the act of February 9th, 1814, 2 Rev. Code 542; and more especially upon the construction to be given to that portion of the act embraced within the sections extending from the 24th to the 38th sections inclusive.

Some of the provisions of this act, particularly the important provisions contained in the 38th section, intended for the protection of the purchaser of lands sold for taxes, have to some extent been adopted in the snbsequent act of April 1st, 1831, concerning lands returned delinquent for non-payment of taxes, Sess. Acts 90, § 7; the act of March 10th, 1832, concerning delinquent and forfeited lands, and providing for the sale of lands returned delinquent thereafter for the

non-payment of taxes, Sess. Acts, 65, § 22 ; Code 204, ch. 37, § 22, the general law providing for sales of land for taxes. By virtue of these laws and other acts intended to carry out the policy of the two first recited acts, the great mass of delinquent lands in the country west of the Alleghany mountains, has been disposed of. The lands have passed into the hands of purchasers and actual occupants under junior patents ; have been placed in a coddition for settlement and improvement, and again become a subject of productive revenue ; and under the general law for the sales of land for taxes, titles have been acquired through all parts of the state, the validity of which may in a great measure depend upon the construction of the law under consideration.

When the act of February 9th, 1814, was enacted, the legislature was fully aware of the construction which had uniformly been put on laws of this description. Few principles of law were more firmly settled, and from their influence on the transactions of others, more widely known than that where the validity of a deed depends upon an act *in pais*, the party claiming under it is bound to prove the performauce of the act ; that in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of such power should precede it ; that the claimant under a sale made to enforce a forfeiture, must show that the law has been strictly complied with : that the recitals in a deed of an officer selling for taxes, were not even *prima facie* evidence of the regularity of his proceedings ; and that these facts must be proved by evidence *aliunde*. *Yancey* v. *Hopkins*, 1 Munf. 419 ; *Christy* v. *Minor*, 4 Munf. 431 ; *Nalle* v. *Fenwick*, 4 Rand. 585 ; *Steed* v. *Course*, 4 Cranch R. 402, *Parker* v. *Rule's lessee*, 9 Cranch R. 64 ; *Williams* v. *Peyton*, 4 Wheat. R. 77 ; *Allen* v. *Smith*, 1 Leigh 231 ; *Ronkendorf* v. *Taylor*, 4 Peters' R. 349.

As the various directions contained in laws for the sale of lands for taxes were frequently disregarded by the officers charged with the duty of making such sales ; and whether complied with or not by the officers, purchasers had but seldom preserved the evidence of such compliance, even if considering the number of such sales, it would have been practicable for each purchaser to procure and preserve that evidence, it followed that but few titles claimed under such sales were sustained by the courts. Confidence in such titles was greatly impaired, and almost destroyed ; and though in the language of the preamble to an act entitled an act more effectually to provide for the payment of taxes upon lands within this commonwealth, passed Jan-

uary 29th, 1803, it is declared to be "a principle in well organized governments, that property should be holden subservient to the purposes thereof," it was manifest that unless some assurance could be held out to purchasers at sales for taxes that a good title could be acquired, the commonwealth would continue to meet with embarrassment for the want of an adequate mode for the subjection of lands to the payment of taxes. Such being the law and public sentiment, the legislature, by an act passed February 6th, 1809, 2 Rev. Code of 1819, 531, provided for the sale of all lands theretofore forfeited or thereafter to be forfeited to the commonwealth for non-payment of taxes; but before the time for sale had arrived, a law passed extending the period for redemption; and by successive laws such period was extended up to the passage of the act of February 9th, 1814; under which the sale of the land in controversy in this suit was made. An examination of this act found in 2 Rev. Code of 1818, p. 542, shows that it was passed with reference to the rules of law and the state of public opinion before adverted to. It was necessary on the one hand to protect the owner who had paid his taxes; and on the other, to give to those who were invited to purchase lands sold by the officer of the law, something like a reasonable assurance of acquiring a good title; something to justify him in paying taxes thereafter and in improving the land. Both objects were carefully regarded by the legislature. Minute directions to the officers are prescribed, forms are furnished for the list of the land tax to be made out by the commissioner of the revenue, the certificate of the clerk verifying its correctness; the return of the delinquent list by the sheriff, and the form of his advertisement of sale; and penalties are imposed on the officers for a failure to perform their respective duties. By the 36th section the former owner of the land was allowed one year after the sale to redeem by the payment of the original purchase money, the costs and charges of executing the deed, together with fifty *per cent. per annum* interest thereon, and the taxes which may have been charged to the purchaser after the sale. Or he might under the 38th section institute proceedings before the expiration of the time for redemption, to show that the taxes were not in arrear, or that the proceedings were not regular, although such arrearages or irregularity did not appear on the face of the proceedings.

Having thus prescribed the duties of the different officers, and made such provisions for the benefit of the party in whose name the land was returned delinquent, as seemed just, the interest and security of the purchaser was next to be attended to. The 28th section

directs the sheriff, on behalf of the commonwealth, to execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly the amount of the purchase money. The 36th section ascertains his indemnity in case of redemption within the time limited; the 37th provides that the sales made and titles vested in the literary fund, shall give only such estate and such right as, at the time the land was returned delinquent was vested in the person in whose name it was returned, his heir, devisee or other person claiming under him: And the 38th section declares that after the time for redemption, thereby allowed, had elapsed the regularity of the proceedings under which the purchaser at the sale, or the literary fund, claims title, shall not be questioned, nor shall the arrearages of the taxes, for the non-payment of which such sale was made or such title was vested, be denied, so as to affect such sale or title, unless such irregularity, or the fact that such arrearage did not exist, appear on the face of the proceedings, or be made to appear by proceedings in court, duly commenced before the expiration of the time for redemption and duly prosecuted to a judgment or decree.

The substantial provisions of this section have been incorporated into the subsequent acts before referred to and the Code; and it becomes therefore a question of general interest to determine what change, if any, these provisions, together with the provision contained in the 8th section of the act of February 6th, 1809, 2 Rev. Code, 532, have made in the condition of the purchaser of land sold for the non-payment of taxes. That section of the act of 1809 declared that it should be the duty of the collector of taxes to make and execute to the purchaser a deed in fee simple for the lands purchased, reciting the cause of sale; and in every action or suit at law or in equity, in which the former owner, &c., &c. shall contest the validity of the sale so made, the *onus probandi* shall lie on the party so contesting.

The deed was part of the proceedings, that part which vested the title in the purchaser at the sale; and as its regularity could not be questioned except in the mode designated by the law, it furnished *prima facie* evidence of title when accompanied with proof of the official character of the sheriff, and of title in the party, &c, in whose name the land was returned delinquent. The 38th section of this act not only embraced the provisions of the 8th section of the act of 1809, but did more. The act of 1809 merely threw the *onus probandi* on the party contesting, to show irregularity; but did not restrict the

party as to the kind of irregularity or the mode of proving it. The 38th section of the act of 1814, restricted the party to irregularities appearing on the face of the proceedings; not even permitting the contesting party to look beyond the proceedings and prove by evidence *aliunde*, though that might be the sheriff's receipt for the taxes, that the taxes had been regularly paid; for it is expressly provided that after the expiration of the time for redemption, the arrearage of taxes for the non-payment of which the land was sold should not be denied.

If the 8th section of the act of 1809 was not embraced by these provisions of the act of 1814, then it did not come within the purview of the latter act: and being *in pari materia*, and not inconsistent with any portion thereof, it continued in full force. But as the latter act, in my view, contains substantially the same provision, the question ceases to be of much interest. Being part of a system originating in 1809 and carried out more fully in subsequent acts, one may reflect light on the other, and serve to remove any doubt as to the legislative intent in provisions of the more recent laws. That intent was to obviate the difficulties which had followed from the application of the principles of law and construction before referred to in cases of this description. So far as it respects sales under this law, it was designed to abrogate the rule which required the claimant to prove that all the prerequisites of the law had been complied with. His deed furnished *prima facie* evidence of title when made by the officer of the law. Upon this he could rest unless its irregularity was shown by the contesting party; and after the time limited it could be questioned for such irregularities only as appeared on the face of the proceedings.

By the 28th section of the act of February 9th, 1814, the sheriff is directed to make a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly, the amount of the purchase money. * * * By the circumstances of the sale, I do not understand that the deed is to recite all the steps to be taken by the various officers which preceded the sale, but the circumstances attending the sale itself; that is to say, that the sale was made at the time and place prescribed for the sale of lands returned as delinquent; that the subject of sale was land so returned as delinquent; if less than the whole lot or tract was sold, how much was sold, who was the purchaser, and the amount of the purchase money: The latter provision being for the benefit of the former owner who was allowed a year after the sale to redeem upon paying the purchase

money. These are the circumstances attending the sale; they show the cause of it, and the deed need contain no other recitals. * * * It seems to me that the validity of the deed does not depend upon its containing a recital that the land was advertised; or if it recites generally that it was advertised, the failure to set forth the mode in which it was so advertised should not vitiate it. Nor do I conceive that such deed could be questioned by parol proof of a failure to advertise the sale as the law prescribes. * * *

The law does not require any return to be made showing that the sale was advertised, or any record to be made of the fact. * * * For the law not requiring any return of the advertisement, or record to be made of it, or of the evidence that it was advertised, it is a matter to be proved or disproved by evidence *aliunde*: And no matter to be made to appear by such evidence, can be received to question the regularity of the proceedings.

The deed, if proved to have been executed by a duly qualified sheriff, should have been permitted to go to the jury as *prima facie* evidence of such title, as according to the 37 h section of the act of February 9th, 1814, it purported to vest in the purchaser at such sale, liable to be questioned according to the 38th section of said act for any irregularity appearing on the face of the proceedings.

Hobbs vs. *Shumates*, decided in 1854, 11 Gratt. 518-19.

This court decided in the case of *Flanagan* v. *Grimmett*, 10 Gratt. 421, that a deed containing such recital of the circumstances of the sale, if shown to have been executed by a duly qualified officer authorized by the law to sell lands returned delinquent for non-payment of taxes, and to execute a conveyance to the purchaser, furnished *prima facie* evidence of the transfer of such title to the purchaser as, at the time the land was returned delinquent, was vested in the person in whose name it was returned, his heirs, &c. But that said deed was liable to be impeached, after the time for redemption allowed by the law had elapsed, by proof of irregularity appearing on the face of the proceedings; or by the fact appearing on the face of the proceedings, that the arrearages of taxes, for the non-payment of which the land was sold, did not exist, according to section 38 of the act of February 9th, 1814. The *onus probandi* is cast upon the contesting party, to show by the face of the proceedings, such irregularity as affected the validity of the deed.

A similar principle has been established in the state of Kentucky, although it does not appear that their law contained any provision

similar to the 38th section of the act of February, 1814. By the law of that state the register was directed to sell such lands at the state house, after advertising the sale, &c. ; and he was empowered to execute deeds for the lands sold. Under this law it has been held in numerous instances, that the deed of the register, purporting to have been made for the sale of lands for taxes, implies *prima facie*, a compliance with the requisitions of the laws under which the land was sold and the deed executed, liable to be repelled by proof that the law was not regularly pursued in making the sale ; and that it is not necessary to the validity of the register's deed that it should recite that the land had been advertised according to the statute. *Allen* vs. *Robinson*, 3 Bibb's R. 326 ; *Graves* v. *Hayden*, 2 Litt. R. 62 ; *Hickman* v. *Skinner*, 3 Monr. 210 ; *Terry* v. *Bleight*, Id. 271 , *Curry* v. *Fowler*, 5 J. J. Marsh. R. 145. The statute in Virginia gives the same effect to the sheriff's deed which the courts of Kentucky ascribed to the deed of the register, because he was an officer of the government presumed to do his duty ; and the 38th section of the act of February 9th, 1814, limits the proof to repel this *prima facie* presumption, to irregularities, &c. appearing on the face of the proceedings.

Chap. 37 of the *Code of Virginia* of 1849, republished with amendments in 1860, p. 199, *et seq.* of the former, and 217 *et seq.* of the latter edition.

CHAPTER XXXVII.

MODE IN WHICH LANDS RETURNED DELINQUENT FOR TAXES SINCE MARCH, 1832, ARE SOLD THEREFOR. OR VESTED IN THE COMMONWEALTH.

Lien on real estate for taxes; how enforced by sale of land; record of such as is delinquent; and mode of paying taxes thereon.

§ 1. There shall be a lien upon all real estate for the taxes assessed thereon, and interest upon such taxes, at the rate of six per centum per annum, from the fifteenth day of December, in the year in which the same may have been assessed, until payment thereof, The first auditor shall keep a record of all real estate which since the tenth day of March, eighteen hundred and thirty-two, shall have been or hereafter shall be returned delinquent for the non-payment of taxes. Until a sale thereof as hereinafter mentioned, any person may, upon a certificate of the first auditor, pay into the treasury the taxes on any such real estate, with interest thereon as aforesaid. For every such

certificate, the person obtaining the same shall pay the auditor a fee of fifty cents.

§ 2. In the month of April, May or June of the year eighteen hundred and fifty, and in one of those months, every five years afterward, the first auditor shall cause to be delivered to the sheriff or collector of the taxes for each county and corporation, a list of the real estate therein, which, since the tenth day of March, eighteen hundred and thirty-two, shall have been, or hereafter shall be, returned delinquent for taxes, and on which the taxes remain unpaid, with a statement of the amount due for the taxes on each tract or lot so returned, and for interest on such taxes.

§ 3. Within twenty days after receiving such list, such sheriff or collector shall make out three copies thereof, and set up one of them at the front door of the courthouse, and the other two at two of the most public places in his county or corporation. To each copy he shall subjoin a notice that the real estate therein mentioned, or so much thereof as shall be sufficient to satisfy the taxes on the same, with interest and commissions of five per cent to the sheriff or collector, will be sold at public auction between the hours of ten in the morning and four in the evening, on the first day of the next succeeding September or October court of his county or corporation, at the door of the court house thereof, unless the said taxes, interest and commission shall be previously paid. Such list and notice shall, if ordered by the court of the county or corporation in which such real estate lies, be advertised for four successive weeks in some convenient newspaper; the expenses of which, shall be apportioned among the delinquents, according to the amount of taxes due by them respectively.

§ 4. If the said taxes, interest and commission, and a due proportion of said expense, be not previously paid, the said sheriff or collector shall proceed to make sale accordingly; and the sale may be adjourned from day to day, and proceed between the hours aforesaid, until it shall be completed. If, however, the sale be not completed on the last day of the court, it shall be adjourned to the first day of the next court. It may then proceed, and be adjourned in like manner as at the previous term. Whenever there is an adjournment to the next court, notice thereof shall be given by advertisement at the door of the court-house.

§ 5. The sale of tracts of land shall be of each tract separately, or such quantity or part thereof, as shall be sufficient to satisfy the taxes thereon, with interest and commission as aforesaid, and its proportion of said expense; and the sale of town lots shall be of each lot

separately, or of such undivided interest therein as shall be sufficient to satisfy the taxes thereon, with such interest, commission, and proportion of expense.

§ 6. The sheriff or collector conducting the sale shall not, directly or indirectly, purchase any real estate sold. If he does, he shall forfeit fifty dollars for every such purchase, and the same shall moreover be absolutely void.

Receipts for purchase money; return of sales.

§ 7. The sheriff or collector, on receiving from any purchaser the amount of purchase money, shall grant to him a receipt for the same to the following effect:

Memorandum of real estate within the county (or corporation) *of , sold this day of , eighteen hundred and , for the non-payment of taxes thereon, for the year .*

Name of person charged with the taxes.	Quantity of land charged.	Local description of land.	Amount of taxes due.	Quantity of land sold.	Name of purchaser.	Amount of purchase money.

Received of the above sum of , it being the amount of purchase money for the land mentioned in the above memorandum.

§ 8. For a receipt made out according to the said form, and signed by the sheriff or collector, he shall be entitled to receive from the purchaser twenty-five cents.

§ 9. The sheriff or collector shall make out a list of the sales, with the following caption thereto: *List of real estate within the county* (or corporation) *of sold in the month* (or months) *of , eighteen hundred and , for the non-payment of taxes thereon for the year .*

Underneath shall be the several columns mentioned in the seventh section, with a like caption to each column. And there shall be an additional column shewing the date of each sale, unless the sales were all one day, in which case the day may be mentioned in the caption.

§ 10. Subjoined to the said list shall be the following oath:

"I, A. B., sheriff (or collector, or deputy) for C. D., sheriff (or collector) of the county of , do swear that the above list contains a true account of all the real estate within my county, which has been sold by me during the present year, for the non-payment of taxes thereon for the year ; and that I am not directly or indirectly interested in the purchase of any of the said real estate. So help me God."

Which oath shall be subscribed and taken before a justice.

§ 11. The said list, with a certificate of the said oath attached thereto, shall be returned to the court of the county or corporation, (whose officer may have made the sales,) at the first or second term next after the completion of the said sales. If the court see no cause to doubt the correctness of the list, it shall order a copy thereof to be certified to the first auditor.

When and how land sold may be redeemed.

§ 12. The owner of any real estate so sold, his heirs or assigns, or any person having a right to charge such real estate for a debt, may redeem the same by paying to the purchaser, his heirs or assigns, within two years from the sale thereof, the amount for which the same was so sold, and such additional taxes thereon as may have been paid by the purchaser, his heirs or assigns, with interest on the said purchase money and taxes, at the rate of ten per centum per annum, from the time that the same may have have been so paid.

§ 13. What is authorized to be paid by the preceding section, may be paid within the said two years, to the clerk of the court of the county or corporation, (whose officer may have sold such real estate) in any case in which the purchaser, his heirs or assigns, may refuse to receive the same, or may not reside, or cannot be found, in the county or corporation.

Land sold and not redeemed.

§ 14. The purchaser of a part of any tract of land so sold and not redeemed within the said two years, his heirs or assigns, shall have the quantity purchased, surveyed and laid off at his or their expense, by the surveyor of the county; or where there shall be no county surveyor, then by some person to be appointed by the court of the county for that purpose; and the said survey to commence on either of the lines of the tract, at the option of the purchaser, his heirs or

assigns, so as not to include the improvements of the same, (if it can be avoided,) and to be in one body, the length whereof shall not be more than double the breadth, where that is practicable. A plat and certificate of the survey shall be returned to the court of the county; and if the court, upon examination thereof, find it to be correctly made, in conformity with this section, it shall order the same to be recorded.

§ 15. When also an entire tract of land is so sold, and not redeemed, within the said two years, the purchaser, his heirs or assigns, at his or their expense, shall have a report made by the surveyor of the county to the court thereof, specifying the metes and bounds of the lands sold and the names of the owners of the adjoining tracts, and giving such further description of the land sold as will identify the same; and the county court, unless it see some objection to such report, shall order the same to be recorded.

§ 16. After the expiration of the said two years, the purchaser of any real estate so sold and not redeemed, shall obtain from the clerk or deputy clerk of the court of the county or corporation, (whose officer may have sold such real estate,) a deed conveying the same, in which shall be set forth all the circumstances appearing in the clerk's office in relation to the sale. Moreover, if the sale be of part of a tract of land, the deed shall refer particularly to the plat and certificate of survey returned, according to the fourteenth section and the order of the court thereupon, and if the sale be of an entire tract of land, it shall refer to the report made according to the fifteenth section, and the order thereupon. * * *

§ 18. Where the purchaser has assigned the benefit of his purchase, the deed may, with his assent, evidenced by his joining therein, or by a writing annexed thereto, be executed to his assignee.

§ 19. If the clerk or presiding justice refuse to execute any deed as aforesaid, the court to which the clerk or justice belongs, may direct the execution, if it deem the same proper.

§ 20. If the purchaser shall have died, his heirs or assigns may move the court of the county or corporation, (whose officer made the sale,) to order the clerk or presiding justice to execute a deed to such heirs or assigns.

§ 21. If no such deed or order of court be made under this chapter, within one year after the expiration of the said two years, the former owner, his heirs or assigns, may, after such year, and before such deed or order is made, redeem the land by paying such amount, with such additional taxes and such interest as is mentioned in the

twelfth section, together with the costs of the survey or report (and interest thereon) if any shall have been made.

§ 22. When the purchaser of any real estate so sold, his heirs or assigns, shall have obtained a deed therefor, according to the six preceding sections, and within six months from the date of such deed, sh all have caused the same to be recorded in the court of the county or corporation in which such real estate shall lie, such estate shall st and vested in the grantee in such deed as it was vested in the party asses sed with the taxes, (on account whereof the sale was made,) at the com mencement of the year for which the said taxes were assessed, notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appear on the face of the proceedings. And if it be alleged that the taxes, for the non-payment of whlch the sale was made, were not in arrear, the party making such allegation must establish the truth thereof, by proving that the taxes were paid.

Saving as to persons under disability.

§ 23. An y infant, married woman, insane person, or person imprisoned, whose real estate may have been so sold, may redeem the same by paying to the purchaser, his heirs or assigns, within two years after the removal of the disability, the amount for which the same was so sold, with the necessary charges incurred by the purchaser, his heirs or assigns, in obtaining the title under the sale, and such additional taxes on the estate as may have been paid by the purchaser, his heirs or assigns, and interest on the said items, at the rate of ten per centum per annum, from the times the same may have been paid. Upon such payment, within two years after the removal of such disability, the purchaser, his heirs or assigns, shall, at the cost of the original owner, his heirs or assigns, convey to him or them, by deed with special warranty, the real estate so sold.

Land purchased by Commonwealth for taxes.

§ 24. When any real estate is offered for sale as aforesaid, by the sheriff or collector, and no person present bids the amount to be satisfied from the sale thereof, the sheriff or collector shall purchase the same on behalf of the commonwealth for the taxes thereon, and the interest on the same, and its proportion of the expense of advertising. A list of the real estate so purchased by the commonwealth shall be made out by the sheriff or collector. After it shall have been verified by him on oath, the court of his county or corporation

shall direct its clerk to make out a copy thereof, and deliver it to the commissioner of the revenue, and shall cause the original lists to be certified to the first auditor. Such copy and list the clerk shall deliver and certify accordingly. The list for the auditor he shall place in a sealed enclosure, directed to that officer, and deliver to the said sheriff or collector. Upon receiving the said list, the auditor shall credit the sheriff or collector with the amount for which the said real estate may have been so purchased, but not with any commission thereon.

[The foregoing are the 1st, 2d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 22d, 23d, 24th and 25th sections of the edition of 1860.]

[Provisions of the Constitution of West Virginia, creating courts and recorder.]

ARTICLE VI.

Judiciary.

1. The judicial power of the state shall be vested in the supreme court of appeals and circuit courts, and such inferior tribunals as are herein authorized.

ARTICLE VII.

Counties and Townships.

1. Every county shall be divided into not less than three nor more than ten townships, laid off as compactly as practicable, with reference to natural boundaries, and containing, as nearly as practicable, an equal number of white population, but not less than four hundred. Each township shall be designated "the township of———— in the county of ————," by which name it may sue and be sued.

2. The voters of each township, assembled in stated or special township meeting, shall transact all such business relating exclusively to their township as is herein, or may be by law, required or authorized, They shall annually elect a supervisor, clerk of the township, surveyor of roads for each precinct in their township, overseer of the poor, and such other officers as may be directed by law. They shall also, every four years, elect one justice; and if the white population of their township exceeds twelve hundred in number, may elect an additional justice; and every two years, shall elect as many constables as justices. The supervisor, or in his absence a voter chosen by

those present, shall preside at all township meetings and elections, and the clerk shall act as clerk thereof.

5. The voters of every county shall elect a sheriff, prosecuting attorney, surveyor of lands, recorder, one or more assessors, and such other county officers as the legislature may from time to time direct or authorize; the duties of all of whom shall be prescribed and defined, as far as practicable, by general laws. * * *

[By this constitution the county court and its clerk are abolished.]

CHAPTER 58.

AN ACT PROVIDING HOW LANDS HERETOFORE OR HEREAFTER SOLD FOR TAXES, AND NOT REDEEMED, SHALL BE SURVEYED AND CONVEYED.

Passed October 7, 1863, Acts of 1863, p. 58.

Be it enacted by the Legislature of West Virginia:

What is authorized to be paid under the fourteenth section of chapter thirty-seven of the Code of Virginia (edition of eighteen hundred and sixty) to the clerk of the court of any county, may be paid to the recorder of any county. Any plat and certificate or report to be returned or made to any county court, under the fifteenth and sixteenth sections of said chapter, shall be returned or made to the circuit court of such county, or to the judge thereof in vacation. Any proceeding or order to be had or made in or by the county court of any county, according to the provisions of said chapter, shall be had or made in or by the circuit court for the county, or by the judge thereof in vacation. Any order made by virtue of this act by a judge in vacation, shall be returned by him to the clerk of the circuit court of the county wherein the sale was made, and shall be by such clerk forthwith entered of record in the law order book of said court. Any deed to be made under said chapter by the clerk or deputy clerk of the county court, shall be made by the recorder of the county, unless he is interested, and then it shall be made by the clerk of the circuit court of the county; in which deed shall be set forth all the circumstances appearing in the circuit court clerk's office, or in the recorder's office, in relation to the sale, and it shall conform in all other respects to the requirements of said chapter. Deeds required by said chapter to be recorded in the court of any county, shall be recorded in the office of the recorder of the county. For every deed executed under this act, the clerk of the circuit court or recorder shall be entitled to one dollar and fifty cents; which the purchaser shall pay him on the delivery of the deed.

AN ACT TO PROVIDE FOR THE SALE OF REAL ESTATE, SOLD FOR THE NON-PAYMENT OF TAXES.

[Passed February 27, 1866.]

[By this act nearly all the provisions of Chapter 37 of the Code of 1849 are re-enacted substantially in the same language, but the sales are made bi-ennial, and the lists of real estate sold are required to be returned to the Recorder, who is required to make the deed. The act contains the following repealing clause :]

32. Chapter thirty-seven of the Code of Virginia, (Second Edition) and Chapter fifty-four of the acts of the General Assembly of Virginia, passed February fourth, eighteen hundred and sixty-two, are hereby repealed.

[The Act contains no repeal of the Act passed in 1863 for the perfecting of titles to real estate theretofore sold.]

[Extract from the opinions of the Judges of the Court of Appeals that the property of citizens is secured by the fundamental law of the land, and cannot be taken, even for public purposes, without compensation.] *Crenshaw* vs. *Slate River Navigation Company*, 6 Ran. 264–5, 76, 83, 4.

[It will be observed that the Bill of Rights of Virginia of 1776, which was not modified till 1852, did not contain any express provision that property should not be taken without compensation, or any other provision for the security of property other than that quoted in one of the extracts that follow.]

Judge CARR.—Here then, is a Law, imposing upon the citizen a burthen, which would render his property worthless, or destroying the property in case he refuses to comply. The question forces itself upon us : Can such a Law bind? That the *eminent domain* of the Sovereign Power, extends to the taking private property for public purposes, I am free to admit. But then, to render the exercise of this power lawful, a fair compensation must always be made to the individual, under some equitable assessment established by Law. This is laid down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country, Thus *Blackstone, volume 1st, p.* 139, speaking of the power of the Legislature to take private property, says, "not by absolutely stripping the subject of his property in an arbitrary manner ; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an

exchange. All that the Legislature does, is to oblige the owner to alienate his possessions for a reasonable price ; and even this is an exertion of power, which the Legislature indulges with caution, and which nothing but the Legislature can perform." Far be it from me to intimate, that the Legislature intended to violate this great principle. I am well assured that they had no such idea. They thought they were promoting the public good, without trenching at all on private right ; and *they* may be right, and *I* wrong. Each of us acts under the highest sanction, and must walk by the light of our own understanding. Following this guide, I must declare it as my solemn conviction, that whether we judge this Law by the principles of all Civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void.

Judge GREEN.—Our Bill of Rights is a part of our Constitution ; and the general principles thereby declared are Fundamental Laws, except so far as they are modified by the Constitution itself. They limit the powers of the Legislature, and prohibit the passing any Law violating those principles. The first Article of this declares, "That all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, *namely*, the *enjoyment* of life and liberty, with the means of acquiring and *possessing property*, and pursuing and *obtaining happiness* and safety." To deprive a citizen of any property already legally acquired, without a fair compensation, deprives him, *quoad hoc*, of the means of *possessing property*, and of the only means, so far as the Government is concerned, besides the security of his person, of *obtaining happiness*. *Liberty* itself consists essentially, as well in the security of private property, as of the persons of individuals ; and this security of private property is one of the primary objects of Civil Government, which our ancestors, in framing our Constitution, intended to secure to themselves and their posterity, effectually, and forever.

Judge COALTER.—The Appellant's right to the use of this water, in exclusion of the *extraordinary navigation* authorised by the Act of 1819, if it did not exist under his patent, is undoubtedly secured to him under those Acts ; and even if there was any irregularity in the form of the Order of Court granting the leave to erect the mill and dam, that Order has never been revised by a regular proceeding, and could not, I apprehend, be now reversed here. But I see no substantial objection to it. If his rights, thus acquired, are to be in-

vaded for public purposes, it can only be done on the principle of making him compensation.

Judge CABELL.—The question as to the nature and extent of the public rights to the use of water-courses, for the purposes of navigation, is one of the greatest importance to the community. But I do not deem it at all necessary to be decided in this case; and therefore I shall give no opinion upon it. Whatever those rights may be, it is competent to the Legislature to relinquish them to individuals, in any mode, and for any purpose, that they may think proper. I concur in the opinion expressed by the other Judges, that whatever rights may have belonged to the public, in relation to the navigation of Slate River, at the site of the Appellant's mill-dam, were relinquished by the Order of Buckingham Court, establishing that mill. And that the rights acquired under that Order, by the owners of the mill, cannot be invaded, even for public purposes, without just compensation.

[Provisions of the Constitution of West Virginia securing rights and property.] Adopted in 1863.

ARTICLE II.

BILL OF RIGHTS.

~~§ 2. No person shall be compelled to be a witness against himself, or be twice put in jeopardy for the same offence.~~

§ 3. The right of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated.

§ 6. Private property shall not be taken for public use without just compensation. No person, in time of peace, shall be deprived of life, liberty or property, without due process of law.

ARTICLE IX.

FORFEITED AND UNAPPROPRIATED LANDS.

§ 1. All private rights and interests in lands in this State, derived from or under the laws of the State of Virginia, prior to the time this constitution goes into operation, shall remain valid and secure, and shall be determined by the laws here ofore in force in the State of Virginia.

[Extract from opinion of the Supreme Court of Appeals that a statute should not be so construed as to do violence to rights that it cannot be supposed the Legislature intended to disturb.] *Spengler* vs. *Davy*, decided in 1859, 15 Gratt. 385–6.

It must be conceded that the words of the law under which the motion was made seem to be very plain, and to leave but little room for construction. * * * Yet it would be absurd to suppose that such could have been the real intention of the legislature. It is manifest that in some instances a rigid enforcement of the law according to the letter, would conflict with other laws, and do violence to rights which we cannot for a moment suppose it was the purpose of the legislature to disturb or impair. * * *

In the Code of 1849, p. 98, 100–1, and what follows, is republished in the Code of 1860.

TITLE 9.

OF STATUTES GENERALLY, AND RULES OF DECISION.

CHAPTER XVI.

FORCE OF THE COMMON LAW AND THE STATUTES BEFORE THE REVOLUTION; ALSO THE MANNER OF PROMULGATING STATUTES, AND THE RULES WHICH GOVERN THEIR CONSTRUCTION.

Construction of Statutes.

§ 17. In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature:

First. The word "state," when applied to a part of the *United States*, shall be construed to extend to and include the district of *Columbia*, and the several territories so called, and the words "*United States*," shall be construed to include the said district and territories.

Second. The words "the governor" shall be equivalent to "the executive power of the commonwealth," or to "the person having the executive power." The word "justice," or "justices," shall be construed as if the words "of the peace" followed them.

Third. Words purporting to give authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

Fourth. The words "personal representative" shall be construed to include the executor of a will, or the administrator of the estate of a decedent, the administrator of such estate with the will annexed, the

administrator of such estate, unadministered by a former representative, whether there be a will or not, a sheriff, sergeant, or other officer who is under the order of a court of probate, to take into his possession the estate of a decedent and administer the same, and every other curator or committee of a decedent's estate, for or against whom suits may be brought for causes of action which accrued to or against the decedent.

Fifth. The words "insane person" shall be construed to include every one who is an idiot, lunatic, *non compos*, or deranged.

Sixth. The word "oath" shall be construed to include an affirmation in all cases in which by law an affirmation may be substituted for an oath, and in the like cases, the word "sworn" shall be construed to include the word "affirm."

Seventh. Unless otherwise expressed, the word "month" shall be construed to mean a calendar month, and the word "year" a calendar year; and the word "year" alone shall be equivalent to the expression "year of our Lord."

Eighth. Where a statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done, may be counted as part of the time.

Ninth. Where a court is directed to be held, or any other proceeding directed by law to take place, on a particular day of a month, if that day happen to be Sunday, the court shall be held or the proceedings take place on the next day. And where a law authorizes a court, or the proceedings of an officer, to be adjourned from day to day, an adjournment from Saturday to Monday shall be legal.

Tenth. The word "land" or "lands," and the words "real estate" shall be construed to include lands, tenements and hereditaments, and all rights thereto and interests therein, other than a chattel interest, and the words "personal estate" shall include chattels, real and such other estate as upon the death of the owner intestate would devolve upon his personal representative.

Eleventh. The words "written" and "in writing" shall be construed to include any representation of words, letters or figures, whether by printing or otherwise.

Twelfth. In cases in which the seal of any court or public office shall be required to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal made upon the paper alone, as well as an im-

pression made by means of a wafer, or of wax, affixed thereto. And in any case in which the seal of any natural person shall be required to a paper, it shall be sufficient for such person to affix to such paper a scroll by way of a seal.

Thirteenth. A word importing the singular number only, may extend and be applied to several persons or things, as well as to one person or thing; and a word importing the plural number only, may extend and be applied to one person or thing, as well as to several persons or things; and a word importing the masculine gender only, may extend and be applied to females as well as males; and the word "person" may extend and be applied to bodies politic and corporate as well as individuals

Fourteenth. The words "preceding" and "following," when used by way of reference to any section or sections of any statute, shall be construed to mean next preceding or next following that in which such reference is made.

§ 18. No new law shall be construed to repeal a former law, as to any offence committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising nnder the former law, or in any way whatever to affect any such offence or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect

[At the end of the Code, in the last chapter, is a similar provision, qualifying the effect of the repeal of former laws by the Code.]

[In the cases of *Flanagan* vs. *Grimmett*, &c., 10 Gratt. 134-5; and *Hobbs* vs. *Shumate*, 10 Gratt. 520-1, extracts from which are copied above, it is decided that the deed made by the proper officer, reciting the propor facts, is *prima facie* evidence that the title to the real estate sold, passed. The following shows that a failure to comply with the letter of the statutes which does not prejudice the owners of the land sold, though apparent on the face of the proceedings, does not impair their validity.]

Randolph Justices vs. *Stalnaker*, decided in 1856, 13 Gratt. 526.

The object of the report and survey is to give such description of the lands sold as will identify them. Specifying the metes and bounds and the names of the owners of adjoining tracts is the mode pointed out to identify them. The description given does identify the land by the lines as surveyed and the calls for all the other objects set out in the report. The survey is for the benefit of the purchaser, and can affect the rights of no other person. The materiality of a survey is apparent when made under the 14th section of the act, which provides for a survey where but part of a tract is sold, and directs how it shall be made; bnt where the whole tract is sold, the only effect of the survey is to furnish the purchaser with such description as may identify the land. The surveyor must report such facts as may serve to describe and identify it He acts officially, and cannot report the names of the owners of adjoining tracts, if they are not known to him. Whether other tracts do adjoin or not, might envolve enquiries as to the boundaries of those tracts and an attempt to try questions without having the parties before the court, and without the means of arriving at a correct conclusion. I think the report comes up to the requisitions of the statute, and gives such a description of the land sold as will identify the same, and it was the duty of the court to order it to be recorded.

[Provisions that indicate the sense of the legislation that tax titles should be sustained.]

Code of West Virginia, Chapter 31, page 193-5.

25. When the purchaser of any real estate so sold, his heirs or assigns, shall have obtained a deed therefor, according to the six preceding sections, and caused the same to be admitted to record in the office of the recorder of the county in which such real estate or the greater part thereof may lie, such estate shall stand vested in the grantee in such deed in and to such real estate as was vested in the party assessed with the taxes for which it was sold, or as was vested in the heirs or devisees of such party, if he be dead, or as was vested in any person or persons claiming said real estate under, by, or through such party, or his heirs or devisees, or in any other way whatever, who have not in his or their own name been charged on the assessor's books of the proper county or district with the taxes on said real estate for the year or years for the taxes of which the same was so sold, and actually paid the same as required by law, at the commencement of or at any time during the year or years for

which the said taxes were assessed, notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appear on the face of the proceedings of record in the office of the recorder, and be such as to materially prejudice the rights of the owner whose real estate is sold. When there are more than one of such owners who are co-tenants of the real estate, if the same be charged to one of them alone, or one and others without naming the others, such estate as was vested in all, or any, or either of them, shall pass the grantee in such deed. When the real estate is charged to heirs by description or to the estate of a deceased party, such estate as was vested in the heirs or devisees of the decedent shall pass to the grantee in such deed. When more than one tract of land is charged as one, or the quantity, or residence of the party is misstated, the title shall nevertheless pass to the grantee in such deed. No irregularity or over-charge as to a part of such taxes or purchase money, nor payment of a part of such taxes, shall invalidate the sale, except as to a part of the real estate so sold proportioned to the whole, as such part of the taxes or purchase money is to the whole thereof. If the real estate be charged to a trustee by name, either with or without the addition of "trustee," or, where there are more than one trustee, if it be charged to one or more of them, and others, without naming the others, and with or without the addition of "trustees," or if it be charged to such trustee or trustees by description, without naming any of them, the title of such trustees and of each and every person for whom or for whose use the said real estate was held in trust by such trustee or trustees, shall pass to the grantee in such deed. If at the time of such sale the real estate sold be under a mortgage or deed of trust, or there be any other lien or incumbrance thereon, and the mortgage, trustee, cestui que trust, or person holding any such lien or incumbrance, shall fail to redeem the same within the time prescribed by the fifteenth section of this chapter, then all the right, title and interest of such mortgagee, trustee, cestui que trust, and of the person or persons holding any such lien or incumbrance on the real estate so sold and not redeemed, shall pass to and vest in the grantee in such deed, and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien, or incumbrance. And no irregularity as to the manner of laying off any real estate so sold, or in the plat, description, or report of the surveyor or other person, shall, after the deed is made, invalidate the sale or deed. If the deed be valid under the sale for the state taxes, it shall not be affected or impaired

by any irregularity in the proceedings and sale for the county and township taxes, or either.

29. In all cases in which a question shall arise as to any such sale or deed, or the effect thereof, such deed shall be prima facie evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs and assigns, and all other persons who might have redeemed the same, within the said one year, as hereinbefore provided, and conclusive evidence against all other persons, that the person named in the deed as recorder was such, that the material facts therein recited are true, and that such estate as is mentioned in the twenty-fifth section of this chapter vested in the grantee in the deed.

[Extract from the opinion of the Supreme Court of Appeals, that a plaintiff without title or right of possession cannot recover land, whether the defendant has title or right, or not.] *Usher's heirs* vs. *Pride*, decided in 1859, 15 Gratt. 201.

It does not appear when or how the defendant entered. But being in possession, and nothing more appearing, he may retain it, and cannot be deprived of the enjoyment of the property by one who is proved not to have any right to the land in controversy. It appears from the Code, p. 560, note to § 14, that a proposition of the revisors to change the rule which permitted a defendant in possession to defeat a recovery by showing an older title than that of the plaintiffs in a third party under whom the defendant does not claim, was rejected by the legislature. The case under consideration must be governed by the general rule as recognized in *Moody* v. *McKim*, 5 Munf. 374, and the recent case of *Atkins* v. *Lewis*, 14 Gratt 30.

[Provisions which show that a plaintiff in ejectment must have title at the time of trial, or he cannot recover.] Code of 1849, ch. 135, p. 561.

§ 23. If the jury be of opinion for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants, as were in possession thereof, or claimed title thereto, at the commencement of the action.

§ 24 Where any plaintiff appears to have no such right, the verdict as to such plaintiff shall be for the defendants.

§ 28. If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be according to the fact, and judgment shall be entered for his damages,

sustained from the withholding of the premises by the defendant, and as to the premises claimed, the judgment shall be, that the defendant go thereof without day.

JUSTICES OF TOWNSHIPS.

Constitution of West Virginia.

ARTICLE VII.

§ 2. The voters of each township, * * * shall, every four years, elect one justice.

§ 8. The civil jurisdiction of a justice shall extend to actions of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed one hundred dollars, when the defendant resides, or being a non-resident of the State, is found, or has effects or estate within his township, or when the cause of action arose therein; but any other justice of the same county may issue a summons to the defendant to appear before the justice of the proper township, which may be served by a constable of either township. In case of a vacancy in the office of justice or constable in any township having but one, or of the disability to act of the incumbent, any other justice or constable of the same county may discharge the duties of their respective offices within the said township. The manner of conducting the aforesaid actions, and of issuing summonses and executions, and of executing and making return of the same, shall be prescribed by law; and the legislature may give to justices and constables such civil jurisdiction and powers, within their respective townships, as may be deemed expedient.

§ 9. Every justice and constable shall be a conservator of the peace throughout his county, and have such jurisdiction and powers in criminal cases therein as may be prescribed by law. Jurisdiction of all misdemeanors and breaches of the peace, punishable by fine not exceeding ten dollars, or by imprisonment for not more than thirty days, may be, by law, vested in the justices.

Act passed in 1863, page 188.

12. The civil jurisdiction of a justice shall be limited to the township in which he was elected, except as hereinafter provided.

13. A justice of one township may issue a summons to the defendant to appear before the judge of another township in the same county, if the suit be cognizable by the latter.

14. And where any township has but one justice, if he be under any disability to act, or the office be vacant, any other justice in the same county may exercise jurisdiction within such township.

15. Where any oath may lawfully be administered, or affidavit or deposition taken, within any township, it may be done by a justice thereof, unless otherwise expressly provided by law.

16. A justice, under such regulations as are prescribed by law, may take within his township the acknowledgement of deeds and other writings, and the privy examination of married women respecting the same; and issue subpœnas for witnesses, and coerce their attendance in any suit pending before him, or any matter in which he may lawfully take depositions.

17. The jurisdiction of justices, within their several townships, shall extend to all civil actions for the recovery of money or the possession of property, including actions in which damages are claimed as a compensation for an injury or wrong: provided, the amount of money or damages, or the value of the property claimed, does not exceed one hundred dollars, exclusive of interest and costs; subject, nevertheless, to the following exceptions:

18. They shall not have cognizance of any action—*First*, To recover damages for an assault, or an assault and battery; or, *Second*. For false imprisonment; or, *Third*, For malicious prosecution; or, *Fourth*, For slander, verbal or written; or, *Fifth*, Against a justice for misconduct in office; or, *Sixth*, On any contract for real estate, or in which the title to real estate is sought to be recovered or is drawn in question, except actions for trespass on real estate, or damages to the same or to rights pertaining thereto, in which the justice shall have jurisdiction, if the damages claimed do not exceed one hundred dollars, and the real estate be in his township; and no claim of title set up by the defendant shall affect the jurisdiction hereby given,

23. The civil jurisdiction of a justice shall not extend to any action unless the cause of action arose in his township, or the defendant, or one of the defendants, resides therein, or being a non-resident of the state, is found or has effects or estate within the township.

[Extract from opinion of the Supreme Court of Appeals that depositions taken before officers, who for want of a commission, are not authorized to take them, though the officers certify that a party appeared, can not be read against such party.] 7. *Unis & others* vs. *Charlton's adm'r & others*, decided in 1855, 12 Gratt. 491.

There is no just exception to the action of the Circuit court in excluding the deposition of the witness Stiles. It appears from the bill of exceptions, that no commission for taking the deposition, no notice of the time and place of taking it, was produced; the record did not show that a commission had been awarded, and the justices in their certificate do not state that they took the deposition by virtue of a commission. There was thus an absence of all proof to show that the plaintiffs had complied with the conditions on the performance of which their right to read the deposition depended. The failure to object to the deposition on this score, before it was offered on the trial, was no waiver of the objection. It was for the plaintiffs to show either an observance of the requirements of the statute under which they claimed a right to read the deposition, or that the defendants had waived or dispensed with it. Whether an appearance of the defendants by counsel, at the time and place of taking the deposition, might have been taken as the evidence of such waiver, is a question which cannot be raised. The only evidence of such appearance is in the certificate of the justices: And as it does not appear that they acted under a commission, they had no warrant or authority to speak in the matter; and their certificate is without force or virtue as proof in the cause.

John S. Hoffman
Counsel for Plff in error.

Supreme Court of the United States.

CHARLES SHUTTE, Plaintiff in Error,

vs.

URIAH THOMPSON, Defendant in Error.

BRIEF AND POINTS OF THE PLAINTIFF IN ERROR.

This was an action of ejectment brought in the district court of the United States for the district of West Virginia, on the 27th day of December, 1859, by Uriah Thompson, Chapman Biddle, and Mary L. C. Biddle his wife, Walter L. Cochran, John Cochran, Ellen Walter, William Kinneys, Catherine Kinneys, Gerrit Smith, Cornelia S. Barclay, Gerrit H. Smith, James W. Cochran, A. Baird, and Cornelia W. Smith his wife, and the Oberlin College, plaintiffs, against Charles Shutte and Lemon P. Bounell, defendants, for the recovery of an estate in fee, in four coterminous tracts of land in the county of Doddridge, of one thousand acres each, granted by the State of Virginia to Jabez Bacon, on the 29th and 30th days of October, 1787, and numbered respectively 14, 15, 16, and 6, in a series of twenty-one tracts, granted in the same month to said Bacon, making one tract of 20,000 acres.

The declaration contains four counts, each one for the fee simple estate in the same four tracts of land.

The *first* count is in the name of all the above-named plaintiffs, for a joint estate.

The *second* count is in the name of the said Uriah Thompson alone, plaintiff.

The *third* count is in the name of Chapman Biddle, and Mary L. C. Biddle his wife, Walter L. Cochran, John Cochran, Ellen Walter, William Kinneys, Catherine Kin-

neys, Gerrit Smith, Cornelia S. Barclay, Gerrit H. Smith, James W. Cochran, and A. Baird, and Cornelia W. Smith his wife, as plaintiffs.

The *fourth* count is in the name of the Oberlin College alone, as plaintiff.

On the 12th April, 1860, the defendants pleaded not guilty. And on the 28th March, 1861, the defendant Bonnell relinquished his plea, and judgment was entered against him. (See printed Record, p. 9.)

Upon the trial of the issue before the jury, the defendant in error offered to read the deposition of *William Underwood*, found on pp. 15, 16, 17, 18, and 19 of printed record, taken by the defendant in error, and which had been filed more than a year in the papers of the cause, and no exception taken or indorsed thereon, and which said witness had since died. To the reading of the deposition to the jury the plaintiff in error objected, "because the 'same was not taken and certified by an officer authorized 'by the acts of Congress to take and certify a deposition, 'so as to be evidence in this court; also because said dep-'osition was taken without any affidavit of the cause or 'reasons for certifying the same, and without any commis-'sion having been issued to authorize the taking of the 'same: also because it was not certified or proved that the 'witness was sworn to testify to the *whole truth*, and for 'other defects and omissions apparent on the face of the 'deposition and certificate." The objection was overruled by the court, and the same was read. This is the subject of the plaintiff's first bill of exceptions. (See p. 15 *et seq.*, printed Record.)

The defendant in error then gave in evidence to the jury grants from the Commonwealth of Virginia to Jabez Bacon, dated in the month of October, 1787, for twenty-one tracts of land, adjoining each other, as laid down on plat of David Sherwood, referred to in bill of exceptions No. 4, (see plat;) the deposition of Nathaniel A. Bacon, (see Record, p. 21,) and proved him a grandson of Jabez Bacon and son of Nathaniel Bacon; that Jabez Bacon died in 1806,

and Nathaniel Bacon died in 1849. And by deposition of Hamilton Hill, (see p. 22, printed Record,) that, between the years 1840 and 1864, he was secretary and treasurer of Oberlin College, and had the custody of the papers belonging to it; and among them there were deeds and patents of real estate in West Virginia, of 20,000 acres of land in Doddridge county, consisting of about twenty or twenty-one patents from the State of Virginia to Jabez Bacon, and several intermediate deeds, which consisted of deeds by several men by the name of Bacon, Philo Murray, Peter Smith, and Daniel Cady; a deed from Peter Smith to Garret Smith and Daniel Cady, and Daniel Cady to Garret Smith, and a deed for the whole tract from Garret Smith to the college; that he saw the deeds occasionally; had not then the deeds in his possession, nor did he know where any of them were. They were sent to George Whiffle, agent, in New York, to effect a sale of part of the land to Fred. Cunningham; sale was made to Cunningham about 1842 or later. By deposition of George Allen, (p. 23,) that search had been made for the deeds and papers mentioned in the deposition of Hamilton Hill, and were not found. And further proved that Jabez Bacon had as many as eight children, of whom Nathaniel Bacon was one, and that the heirs of said Jabez Bacon were very numerous. (See testimony of F. D. Parish, p. 92.) The defendant in error then offered to read in evidence to the jury a paper, purporting to be a deed from Nathaniel Bacon to Philo Murray, dated the third day of May, 1815, (see pp. 23, 24,) to which the plaintiff in error objected. His objection was overruled and paper read, which was the subject of the *second bill of exceptions.* (See p. 20 *et seq.*)

The defendant in error then offered to read to the jury a paper purporting to be a copy of a deed from Philo Murray to Peter Smith, dated the 22d of April, 1815. (See pp. 25, 26, 27.) The reading of it was objected to by plaintiff in error; the objection overruled and paper read, which was the subject of the third bill of exceptions. (See p. 25, *et seq.*)

After the matters aforesaid had been given in evidence

neys, Gerrit Smith, Cornelia S. Barclay, Gerrit H. Smith, James W. Cochran, and A. Baird, and Cornelia W. Smith his wife, as plaintiffs.

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The defendant in error then gave in evidence to the jury grants from the Commonwealth of Virginia to Jabez Bacon, dated in the month of October, 1787, for twenty-one tracts of land, adjoining each other, as laid down on plat of David Sherwood, referred to in bill of exceptions No. 4, (see plat;) the deposition of Nathaniel A. Bacon, (see Record, p. 21,) and proved him a grandson of Jabez Bacon and son of Nathaniel Bacon; that Jabez Bacon died in 1806,

and Nathaniel Bacon died in 1849. And by deposition of Hamilton Hill, (see p. 22, printed Record,) that, between the years 1840 and 1864, he was secretary and treasurer of Oberlin College, and had the custody of the papers belonging to it; and among them there were deeds and patents of real estate in West Virginia, of 20,000 acres of land in Doddridge county, consisting of about twenty or twenty-one patents from the State of Virginia to Jabez Bacon, and several intermediate deeds, which consisted of deeds by several men by the name of Bacon, Philo Murray, Peter Smith, and Daniel Cady; a deed from Peter Smith to Garret Smith and Daniel Cady, and Daniel Cady to Garret Smith, and a deed for the whole tract from Garret Smith to the college; that he saw the deeds occasionally; had not then the deeds in his possession, nor did he know where any of them were. They were sent to George Whiffle, agent, in New York, to effect a sale of part of the land to Fred. Cunningham; sale was made to Cunningham about 1842 or later. By deposition of George Allen, (p. 23,) that search had been made for the deeds and papers mentioned in the deposition of Hamilton Hill, and were not found. And further proved that Jabez Bacon had as many as eight children, of whom Nathaniel Bacon was one, and that the heirs of said Jabez Bacon were very numerous. (See testimony of F. D. Parish, p. 92.) The defendant in error then offered to read in evidence to the jury a paper, purporting to be a deed from Nathaniel Bacon to Philo Murray, dated the third day of May, 1815. (see pp. 23, 24,) to which the plaintiff in error objected. His objection was overruled and paper read, which was the subject of the *second bill of exceptions.* (See p. 20 *et seq.*)

The defendant in error then offered to read to the jury a paper purporting to be a copy of a deed from Philo Murray to Peter Smith, dated the 22d of April, 1815. (See pp. 25, 26, 27.) The reading of it was objected to by plaintiff in error; the objection overruled and paper read, which was the subject of the third bill of exceptions. (See p. 25, *et seq.*)

After the matters aforesaid had been given in evidence

to the jury by the defendant in error, and after he had given in evidence the plat and report of Daniel Sherwood, surveyor, the plaintiff in error gave in evidence copies of surveys made for Thomas Laidly, numbered from 1 to 30, both inclusive, and from 34 to 36, both inclusive, made in the months of January and February, 1785, and a survey of 926 acres, made for Richard Mason, 26th January, 1785; one of 500 acres, made for William Barkley, 8th of August, 1785; one of 715 acres, made for John Lynn, 7th of February, 1785; and one of 4,000 acres, made for Joshua Jackson on the 20th of August, 1785; and all made by the same surveyor. (See pp. 28 to 63, both inclusive, and plat and report of Sherwood; also copies of *five* grants from the Commonwealth of Virginia to John Reed, for the lots numbered respectively 18, 25, 26, 27, and 28.) So surveys for said Laidly, and dated on the 16, 17, and 18 of January, 1787. (See pp. 64, 65, 66, 67.) And after the plaintiff in error "had introduced a witness, who testified that an old man 'who was dead, had told him that he was one of the chain-'carriers who assisted in making said surveys for Thon... 'Laidly, and that the surveyor, at the time of making the 'same, had made a corner thereof, near the Rock Lick, at 'the point indicated by the red letter, 'E,' on the plat made 'by Surveyor Sherwood," (see p. 77,) and other witnesses who gave testimony tending to prove that the poplar tree in the forks of Ten Mile, at the point indicated by the letter "A" on the plat, was the eastern corner of the said survey No 1, of 2,000 acres surveyed for Thomas Laidly; and a corner of said survey of 927 acres made for Richard Mason; and that the white oak, on a ridge between the right-hand fork of Ten Mile and Isaac's creek, at the point indicated by the red letter "I" on said plat, was the eastern corner of the said survey of 927 acres; and after having given other evidence, tending to locate the surveys aforesaid of Thomas Laidly, Richard Mason, John Lynn, and William Barkley as they are laid down and represented on the said plat made by Surveyor Sherwood; and the plaintiff in error who, at the institution

of this suit, it was agreed, was in possession of, and claiming under the grants to Caleb Boggess and John R. Boggess, found on pages 73, 74, 75, 76, and 77, (see p. 78,) who claimed to have acquired so much of the land covered by the said five grants to John Reed, as was included within these said grants, because the same was forfeited to the Commonwealth, which said forfeiture was agreed to by the parties, (see p. 95;) and, to further identify the said Laidly surveys, offered to prove by a witness, who lived, and had lived for many years in the neighborhood of said Laidly's survey No. 1, as laid down on Sherwood plat; that the poplar corner, represented on said plat at red letter "A," was, and had been for many years, known and reputed in the neighborhood as the poplar beginning corner of Laidly's survey No. 1; but the defendant in error objected, and the court sustained the objection, "and refused to let the defendant (plaintiff in error) prove the 'reputation of the neighborhood as to the said poplar 'corner at the present day, *unless such reputation was traditionary in its character, having passed down with those who 'were acquainted with the reputation of the tree at an early day 'to the present time, or that the information as to such reputation was derived from ancient sources; or from persons who 'had peculiar means of knowing what the reputation of the tree 'was at an early day.*" To this the plaintiff in error excepted, and this is the subject of his *fourth* bill of exceptions.

After the evidence, heretofore referred to, and relied upon by the defendant in error to show title of the 20,000 acres of land in Peter Smith, the depositions of Gerret Smith and Asa Raymond were read, (see pp. 79, 80,) to prove the heirs of Peter Smith, on the 18th of August, 1853, the date of the deed from Peter Sken Smith and others to the Oberlin College for the 20,000 acres of land granted to Bacon; the deed of the last above date from Peter Sken Smith and others, heirs of Peter Smith, to the Oberlin College, (see pp. 80, 81,) the deed from the Oberlin College to Uriah Thompson, dated the 5th of September, 1854, for 10,827½ acres of said 20,000 acres of land,

(see p. 88,) admitted to record in Doddridge county, 9th January, 1855. (See p. 89.)

That the said tract of 10,827½ acres was for the year 1857 returned delinquent for the amount of $43.31 taxes due thereon for that year, (see p. 72;) the plaintiff in error then offered to read in evidence to the jury a deed from T. K. Knight, recorder, to John S. Hoffman (see pp. 89,90) for the said tract of 10,827½ acres, who became the purchaser thereof at the sale for taxes, to be accompanied with proof that the land was wholly within the county of Doddridge: that it had been assessed with the taxes for the year specified in said deed, and had been returned delinquent therefor; that the person who made the sale was the sheriff, duly qualified; and that said Knight, by whom the deed was made, was the recorder of Doddridge county, duly qualified and acting as such: but to the admissibility of said deed, with such proof, the defendant in error objected, and the court sustained the objection; and this ruling of the court is the subject of the *fifth* bill of exceptions.

The defendant in error claimed that part of 20,000 acres granted to Jabez Bacon in October, 1787, as were within the four coterminous tracts of 1,000 acres each, mentioned in his declaration, through those grants from the Commonwealth of Virginia of that date, by means of the several conveyances heretofore mentioned and referred to, viz: Nathaniel Bacon to Philo Murray, of 3d day of May, 1815; Philo Murray to Peter Smith, of the 22d day of April, 1815; Peter Sken Smith and other heirs of Peter Smith to the Oberlin College, of the 18th day of August, 1853; and from the Oberlin College to Uriah Thompson, of the 5th day of September, 1854; and his right to recover was based thereon. And the plaintiff in error claimed so much of the 4,000 acres, in the declaration mentioned and described, as was within the grants to the said Caleb Boggess: of 586 acres, dated 13th Nov., 1846, (see p. 73;) of 40 acres, dated 13th September, 1847, (see pp. 73, 74;) of 158 acres, dated 31st December, 1849, (see p. 74;) and the grant to John R. Boggess of 5,200 acres, dated the 1st July, 1854, (see pp.

74,75,76.) The tract of 586 acres is laid down on the plat of Surveyor Sherwood, and shaded red. The other two tracts, granted to said Caleb Boggess, and the grant of 5,200 acres to John R. Boggess, adjoin the tract of 586 acres and adjoin each other, and the manner thereof is shown by the terms of the grants; and that the defendant in error could not recover the same from him, because it was covered by the five prior grants to said John Reed; and those claiming under the grants to Bacon, had not better title thereto.

It was agreed, (see p. 95,) that the lands so granted to Reed became forfeited to and were vested again in the Commonwealth in 1836, because of the omission of the owner to enter the same on the commissioner's books of Harrison county, and charged with taxes.

And it was shown by the certificates of the auditor of the State, (see pp. 68, 69,) that for the years 1799, 1800, 1812, 1813, the Bacon land was delinquent for the taxes due thereon, amounting to $29 30; and for the year 1826 was delinquent, in the name of Peter Smith, for the taxes of that year, amounting to $8. (See certificate of E. T. Nicklen, p. 72.) None of which taxes appear to have been paid by any one. It was shown by the plat and report of Surveyor Sherwood, that a part only of the Bacon lands were covered by the five grants to Reed of 2,000 acres each; that the four lots of Bacon lands described in the declaration of the cause, viz, Nos. 14, 15, 16, and 6 were nearly, if not entirely, covered by said grants to Reed; and from the plat and report it is shown that the Leatherman lands, laid dewn thereon and shaded *green*, cover a portion of each of said four lots claimed in the declaration, and which said Leatherman lands were, by the terms of the deed from the Oberlin College to the defendant in error, excluded therefrom. It was shown that tenants of Garret Smith were placed upon the Bacon lands from periods commencing in about 1826; but all such occupations by them were in parts of the land outside of the "Leatherman" lands, and outside the grant to Reed, except that of Gideon Roberts, who, about the year 1837, occupied and

made an improvement on Riggins' run, on the line of Reed's grant No. 25, and near where the line of that grant, on the northwest side thereof, crosses said run, the larger part of the improvement, consisting of 20 acres, was within the Reed grant.

The counsel having argued the causes, the jury presented a written request that the court would instruct them upon certain matters of law.

And thereupon the court instructed the jury as follows:

"1st. That if the jury believe that the lands in controversy are within the grants to Jabez Bacon, and that they were delinquent for the non-payment of taxes prior to 1815, and that the amount for which they were so delinquent exceeded ten dollars, and were not paid or released by law, then, under the act of 1831, they became forfeited, and the forfeiture was absolute in October, 1834, and all the right and title of the patentee, Bacon, vested in the Commonwealth.

"2d. And if they further believe that the plaintiffs, or those under whom they claim, took charge of the lands within the grants to Jabez Bacon in 1817 and exercised authority over them, and in 1826 they took actual possession of the same, and have so continued in the possession of the same up to the institution of this suit, claiming them as their own under the Bacon grants and the deed to Peter Smith, paying all the taxes duly assessed and charged against them, on such lands, and all taxes that ought to have been assessed and charged against them, then the Bacon lands (if) forfeited as aforesaid to the Commonwealth, became and were actually vested in the plaintiffs, or those under whom they claim, in October, 1834, under the act of 1832; but if the taxes assessed and due upon the lands against Smith do not amount to ten dollars, they are released by the act of 1832.

"3d. That if the jury believe from the evidence that the land in controversy was covered by the grants to John Reed as well as by the grants to Jabez Bacon, and that

'the grants to Reed were the oldest, and that under the 'act of 1835 they became forfeited for non-entry, and that 'said forfeiture was complete in November, 1836, that the 'plaintiffs were the *bona fide* occupants of the land in con- 'troversy, or any part thereof, claiming title to the same, 'and that they have paid all the taxes duly assessed, 'charged, and chargeable against them, from the time 'when they acquired their title thereto, that the lands in 'controversy, so forfeited in the name of John Reed, under 'the act of 1835, became transferred and absolutely vested 'in the plaintiffs or those under whom they claim, and that, 'if the taxes charged against Peter Smith on the Bacon 'lands before 1832 were for less than ten dollars, they were 'released by law."

The plaintiff in error excepted to the second and third instructions so given, and this forms his *sixth* bill of exceptions.

The jury rendered a verdict for the defendant in error for the lands described in the declaration and that he had an estate in fee simple therein, and against the other plaintiffs below. They found for the defendant, (the plaintiffs here,) (see p. 13,) and judgment was rendered thereon.

From the judgment aforesaid the cause was removed to this court by writ of error.

POINTS.

I.

The deposition of William Underwood, referred to in the first bill of exceptions, should not have been read to the jury, because it was not taken and certified in conformity with the provisions of the statute. (See act of Congress of 24th Sept., 1789, § 30.)

1st. In this, that it was not taken and certified by either of the officers therein designated. It was taken before a "justice of a township," one of the subdivisions of a county of the State, (see Const. W. Va., art. VII, §§ 1, 2, 8, 9, 10, 11, and Sess. Acts 1863, chap. 122, §§ 12, 16, 17, 18, 23, and Acts of same session, chap. 132, §§ 1, 2, 3, 4, *et seq.*;)

from which it will appear that, except as a mere conservator of the peace, his judicial powers are limited to the township in which he is elected, and he was therefore not a judge of a "county" court, within the meaning of the statute.

It is equally clear that he was not judge of a court of "common pleas."

In neither the constitution of the State or the statutes is there any court known by that *name*. If there be such an one, it must then be so, by reason of its constitution or jurisdiction, or both, and these features of it such as to make it a court of that kind, as distinguished from other courts.

"Common pleas," says Bouvier, in his Law Dictionary, is "the name of a court having jurisdiction generally of civil 'actions. In England, whence we derived this phrase, 'common pleas are so called to distinguish them from pleas 'of the crown."

The court of common pleas of England is generally supposed to have been granted by *Magna Charta*, and was then distinguished from other courts, by being fixed at a certain place, instead of following the person of the king, or his representative; having general jurisdiction over the other courts of the realm. (See Tomlins's Law Dictionary."

In speaking of this court, Lord Coke says: "It is the 'lock and the key of the common law in common pleas; 'for herein are real actions, whereupon fines and recoveries 'pass; as also all other real actions by original writs; also 'common pleas, mixed or personal, in divers of which the 'king's bench has a concurrent jurisdiction with this 'court." (4 Inst., X, 99.) It had jurisdiction of prohibition, *habeas corpus*. (Bacon's Abridgt., tit. Court of Common Pleas.)

None of these features characterizing the English courts of common pleas, or of the other courts of the several States, which are called courts of "common pleas," are discernible in the constitution and jurisdiction of the township justice of the State of West Virginia. They are without clerk and without seal; no fixed time for, or place of sessions.

3 Blackst. Comm., p. 38, Sharswood.

2d. The *conditions* upon which a deposition, in a suit at law, was authorized to be taken, does not appear to have existed, namely: that the witness lived "at a greater dis-'tance than one hundred miles from the place of trial," or "was bound on a voyage to sea," or "was about to go 'out of the United States," or "was ancient and very in-'firm."

Some one of these conditions or reasons should appear on the face of the deposition, and not be left to parol proof. For the act of Congress directs that the deposition shall, together with the *certificate of the reasons*, as aforesaid, of their being taken, be by him, the magistrate, sealed up and returned.

Harris *v.* Wall, 7 How. Rep., p. 705.
Bell *v.* Morrison *et al.*, 1 Pet., p. 351; read p. 355.

3d. It is further required by the act of Congress, that "every person deposing, as aforesaid, shall be carefully 'examined and cautioned, and sworn or affirmed, to testify 'the whole truth," and this should have been done, and so certified, by the magistrate taking the deposition.

Rainer, use, &c. *v.* Haynes, Humph. R., p. 689.
Bell *v.* Morrison *et al.*, 1 Pet., 351.

4th. The appearance of counsel, and cross-examining the witness, was not a waiver of his right to object to the reading the deposition at the trial, for want of authority to take it, or for failure to take it in the manner prescribed by the act of Congress; but was merely a waiver of the *service* of notice. But, except from the statement on the deposition, it does not appear that there was any such appearance, and that is not sufficient.

Unis and Others *v.* Charleton's Adm'r, 12 Grat., p. 484; see p. 491.

5th. It does not appear from the statement of the witness, whether there existed either one of the four reasons mentioned in the act of Congress authorizing a deposition *de*

bene esse to be taken, nor does it so appear in any other part of the deposition or certificate. In the absence of all these, and until the deposition was offered to be read, the plaintiff in error could not know whether it would be offered, or upon what ground its reading would be asked for. It would be a harsh rule to require the plaintiff in error to anticipate all these things, and state them in the form of exceptions. It does not appear when the witness, Underwood, died. Nor does it appear that the plaintiff in error knew or had been informed of his death, until the deposition was offered to be read for that reason. This fact, then, ought not to be a subject of inference against him.

II.

The papers purporting to be copies of the deeds from Nathaniel Bacon to Philo Murray, and from Philo Murray to Peter Smith, were not legally admissible as evidence.

They purport to be copies from the record of deeds, and it must appear that such record was made in compliance with the statute authorizing it—

Pollard's Heirs *v.* Lively, 4 Grat. R., p. 216.
Harvey *v.* Alexander, &c., 1 Rand. R., 219.
Maxwell *v.* Light, 1 Call R., 117.

—and it is submitted that this was not done.

1st. The act of 13 December, 1792, chapter 28, § 1, providing for the record of deeds generally, was not complied with.

2d. The act of the 25th of December, 1794, (see chap. 6, § 2, Acts of 1794, Hen. Stats. at Large, new series, vol. 1,) providing for recording deeds made out of the State of Virginia, was not complied with. It did not appear that the District court held at New Haven was a court "of or 'in the country in which the parties shall dwell."

3d. Nor does it appear that the acknowledgment before the court, if made before a proper court of the country, was certified by the court in the manner such acts are usually authenticated by it. The acknowledgments are certified, on the 26th and 27th of February, 1817, to have been made

in the court at New Haven, on the fourth Tuesday in February, 1817, by H. W. Edwards, who calls himself clerk, and says he affixed the seal of the court; and Pierpont Edwards, as judge of the court, at some time (without date) certifies that H. W. Edwards "is clerk of said court."

Trigg *v.* Conway, Hemp. R., p. 538.

Drummond's Adm'r *v.* Magruder & Co., 9 Cranch, p. 122.

4th. The act of 1794 limits the authority to the court or other officer, to that of a "city, town, or corporation, of or 'in the country in which the party (grantor) shall dwell;" and further, that the party shall "reside not in Virginia." It is therefore submitted, that the said act did not contemplate the United States courts, but courts of law of a city, town, or corporation of the country in which the party shall dwell.

III.

The plaintiff in error having shown surveys to Thomas Laidly for a large number of adjoining tracts of land, all made by the same surveyor, and eighty years before the trial, each tract calling for the one preceding it in order to the first—No. 1; that lot No. 1 was as laid down on the plat of Surveyor Sherwood, and claimed by the plaintiff in error, adjoined by the other surveys for which that one called; that the corner at "A" was anciently marked to suit the calls of lot No. 1, ought to have been permitted to prove, as set forth in the 4th bill of exceptions, "*that the 'poplar corner, represented on said plat as standing at red letter 'A, was, and had been for many years, known and represented 'in the neighborhood as the poplar beginning corner of said 'Laidly survey, No. 1*," to further identify the lots Nos. 18, 25, 26, 27, and 28, which were in some measure dependent on the identity of lot No. 1: as reputation of ancient boundaries: as matters of general interest. (1 Greenl. Ev., §§ 128, 138, 145, and note; Boardman *v.* Reed, 6 Pet., 328; 1 Stark Ev., pp. 54, 55.)

The particular fact, that the tree had been anciently

marked, and to suit the calls of the survey, had been proved *aliunde*, and the evidence of reputation to explain it should have been allowed.

1 Greenl. Ev., § 138.

This was substantially refused by the qualifications imposed by the court, in requiring

1st, that the reputation was "traditionary in its character, having passed down from those who were acquainted with the reputation of the tree at an early day to the present time." Or

2d, "that the information as to such reputation was derived from ancient sources." Or

3d, "from persons who had peculiar means of knowing what the reputation of the tree was at an early day."

Each of which was a mere circumstance superadded, which would affect the value of the testimony offered, but not the character or competency of it.

IV.

It was error in the court to refuse the introduction in evidence to the jury the deed from T. K. Knight to Jno. S. Hoffman, mentioned in the fifth bill of exceptions:

1st. Because, in an action of ejectment to recover the fee, it is competent for the defendant to show the title to the land claimed, out of the plaintiff, and for this purpose may show title in another.

Atkins v. Lewis 14 Grat. 30
Tyler on Ejct. p. 564

2d. Because, in accordance with the general rule of law in relation to all actions for specific property, requiring the plaintiff to show title at the time of the trial, it was by the statute under which this suit was brought provided, that "if the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before the trial, the verdict shall be according to the fact, and judgment shall be entered for his damages sustained from the with-

holding of the premises by the defendant. And as to the premises claimed, the judgment shall be, that the defendant go thereof with day."

See Code of Va., 1849, chap. 135, § 28.

The land was delinquent in the name of the defendant in error for the year 1857, and the taxes by statute constituted a lien on the land.

See Code Va., 1849, chap. 37, § 1.

To enforce this lien under the provision of this chapter, the land was regularly sold on the twenty-third day of October, 1860, and purchased by the said Hoffman, and who proceeded in conformity with the said chapter and the provision of an act of the Legislature of West Virginia, passed 7th of October, 1863, providing "how lands heretofore or hereafter sold for taxes, and not redeemed, shall be surveyed and conveyed." (See chap. 58, act of West Va., p. 58, to obtain his said deed and caused it to be recorded.)

No reason is disclosed in the record why the deed was objected to, nor why it was excluded by the court. It was not irrelevant, as shown above, and the regularity of the proceedings, from the face of the deed, together with other proof offered in connection with it, plainly appeared. (See 2 Rev. Code Va., (1819,) ch. 20, p. 537, a similar statute, and the construction given to it; case of Flanagan *v.* Grimmet *et al.*, 10 Grat. R., p. 421; Randolph Justices *v.* Stalnaker, 13 Grat. R., p. 523; Hobbs *v.* Shumate, 11 Grat., 516.

Anticipating the only objection to the deed which was urged upon the trial, (though not shown by the record,) viz, that prior to the date of the deed the chapter 37 of the Code of Va., 1849, was repealed by § 32, chap. 90, Acts of W. Va., Sess. 1866, p. 91, passed 27th of Feb., 1866, and the deed subsequently obtained was void.

To this objection it is claimed in reply, that the laws of Virginia were in force in W. Va. (See act of W. Va., ch. 103, p. 136, and among them the chap. 16, Code of Va., p. 112.) Sec. 18 of this chap. provides that "no new law shall be so construed as to repeal a former law, or to any right accrued or claim arising under any former law, or in any way affect any such right accrued or claim arising, save that the proceedings shall conform as nearly as practicable to the laws in force at the time of such proceedings."

The act of 1866 did not in terms, and could not by construction, repeal the act of 7th Oct., 1863. It provided for the only other thing to be done by the purchaser, at its sale made to enforce the State's lien for taxes, which remained to be done.

The act of 26th Feb., 1866, was not intended to affect any right or interest or claims arising under chap. 37 of the Code of Va., because it substantially re-enacted it, to take effect simultaneously with the repeal of the other, and was a continuation of the former law.

Steamship Co. *v.* Joleffe, 2 Wall., p. 450. (See 458.)

Any other intention would have been in conflict with the constitution of the State of W. Va., which provides that "all pending rights and interests in lands in this state, derived from or under the laws of Virginia, prior to the time this constitution goes into operation, shall remain valid and secure, and shall be determined by the laws heretofore in force in the State of Virginia." (Art. IX, sec. 1.)

As a further limitation on the power of the Legislature to deprive a purchaser at a tax sale of the benefit of his purchase, which is a contract, (see art. XI, Const. W. Va., §§ 1, 6; and McCracken *v.* Hayward, 2 How., 608; Fletcher *v.* Peck, 6 Cranch, p. 88.)

V.

The instructions given to the jury by the court did not clearly and correctly propound the law of the case.

The claimant, to take the forfeited title, must have an apparent title, regularly derived from the Commonwealth, good on its face, just and *bona fide* in its acquisition. and must have discharged all the State's lien for taxes. (Act 1831, ch. —, §§ 8, 9, 10; Sup. Rev. Code, p. 349; Act 1842, ch. '3, § 3, p. 13; Act 1846, ch. 6, § 3, p. 14; Act 1857–'58, ch. p. 43; Act 1859–'60, ch. 66, p. 17; Act 1835, p. 11; e W. Va., ch. 31, § 34, p. 199; Wild's Lessee *v.* Supell, 10 Grat., 405.)

These acts and authorities show that the Legislature and court regarded the statute as properly transferring a forfeited title only to a person having a good title on its face under another grant.

Gore *v.* Lawson, 8 Leigh.
Staats *v.* Board, 10 Grat.
Levasser *v.* Washburn, 11 Grat.
Usher's Heirs *v.* Pride, 15 Grat., 190.

The taxes charged was a lien on the land.

Act 1812, Appendix Code 1819, 2 vol., p. 537, ~~ch. 105~~.
Act 1819, 2 Rev. Code, ch. 183, § 88, p. 39.
Act 1832, Sup. Rev. Code, ch. 290, p. 358.

C. BOGGESS,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

CHARLES SHUTTE,

PLAINTIFF IN ERROR,

vs.

URIAH THOMPSON et als.,

DEFENDANTS IN ERROR.

This is an action of ejectment tried in the district court of the United States for the district of West Virginia, holden at Clarksburg.

The questions for decision in this court arise out of six bills of exceptions, taken to the rulings of the court in the progress of the trial of the cause.

The first bill of exceptions is to the opinion of the court, allowing the deposition of W. Underwood to be read to the jury, (page 19.) The facts upon which the court allowed the deposition to be read are stated by the court on page 19 of the record. The defendant in error, to sustain the opinion of the court, relies on the following authorities: 3d Cranch, 297; 8th Buddiman vs. Kirk; Rich vs. Lambert, 12 How., 347.

By a remark of the judge, the laws of the State where deposition is taken, may be referred to; the deposition in Virginia is good. (See code of Virginia 1860, sect. 23.) The rules of the court, in district court of West Virginia, adopt the laws of the State so far as not repugnant, &c. (7 Wh., Evans vs. Eaton, 356; 11 Howard, 392, 393.)

The second and third bills of exceptions are identical. The first is for error in admitting the deed of Nathaniel Bacon

to Philo Murray to be read to the jury, dated in 1815. The second for admitting the deed of Murray to Peter Smith, dated in 1815. Each were acknowledged before the district court of the United States, holden at New Haven, Connecticut. For second exception, see page 20; third exception, page 35.

The law of Virginia provides that a deed acknowledged by persons residing in any of the United States, before any court of law, and certified by the court, shall be admitted to record, a copy of which shall be evidence. (1st Rev. Code of Virginia, page 371; Chapman vs. Smith, 10th Gratton; Hasler vs. King, 9th Gratton.

The fourth bill of exceptions begins on page 27 and ends on page 78. The defendant offered in evidence plats and certificates of thirty-three surveys made for Thomas Laidley, one for Richard Mason, one for Wm. Barclay, one for John Lyne, and one for Joshua Jackson, and five patents to John Reed, numbered, respectively, 18, 25, 26, 27, and 28. He also gave in evidence the plat of surveyor Sherwood, and evidence tending to prove the lands of Laidley were correctly laid down as shown by the map; and among other proof, offered to prove by witness, who had lived many years in the neighborhood of said T. Laidley's survey No. 1, that the poplar corner represented on the plat by letter A was and had been for many years reported in the neighborhood as the poplar beginning corner of Laidley's survey No. 1. The plaintiff objected to such proof of reputation of a beginning corner. The matter being submitted to the court the objection was sustained, and refused to let the defendant prove the reputation of the neighborhood as to said corner at the present day, unless such reputation was traditional in its character, having passed down from those who were acquainted with the reputation of the tree at an early day to the present time, or that the information as to such reputation was derived from ancient sources, or from persons who had peculiar means of knowing what the reputation of the tree was at an early day. But the court permitted the de-

fendant to prove that the occupants of the Laidley lot No. 1, and of Mason's 927 acre tract, and those under whom they held, claimed the said poplar as the true corner of Laidley survey No. 1 and Mason's 927 acre tract. To the above opinion of the court, rejecting recent reputation as evidence, the plaintiffs excepted.

The plaintiffs insist that there is no error in the above ruling of which the defendant can complain. The plaintiffs refer to the following authorities to sustain this opinion: 1st Starkie on Evidence, Sec. 34, Page 54, and extending to page 62.

The fifth bill of exceptions, beginning at page 78 and ending at page 91, is for refusing to allow a tax deed, made by the recorder Knight, of the county of Doddridge, to John S. Hoffman, to go as evidence to the jury. (See deed, pages 89 and 90.) It appears by this deed that the land in controversy had been returned delinquent in Doddridge county, Virginia, for the non-payment of the taxes thereon for the year 1857, in the name of Uriah Thompson, one of the plaintiffs. That under the laws of Virginia, ch. 37, of the code of Virginia, this land was sold in October, 1860, for the delinquent taxes of 1875 aforesaid. By chapter 37 aforesaid, two years were allowed for redemption, and after that, under sections 15 and 16 of that chapter, if not redeemed, the purchaser was required to have a survey of the land made and reported to the court, which court, on examination, could approve it, and order the survey to be recorded. Thereupon the clerk was bound to make the deed in conformity to the survey so ordered to be recorded by the court. As appears by the deed, no survey was made and reported to the court until 24th March, 1866, which survey the judge of Doddridge county then ordered to be recorded. In 1861, what was called the restored government of Virginia was established, and was continued until the 20th of June, 1863, when the government of West Virginia was established and organized. It seems by the subsequent legislation of West Virginia, she overlooked the taxes due Virginia as well as the purchasers of lands for taxes

at the sales of 1860. For, by an act of her legislature passed in February, 1866, (session acts, page 81,) she provided a law for future sales, and provided for deeds for all sales made in 1865, and for all sales thereafter to be made. That act repeals the entire chapter of the code of Virginia by section 32, page 91 Section 33, page 92, provides for redemption as well as for deeds for lands sold in 1865, but repeals the old law, (chapter 37 of the code,) by which alone deeds could be made for sales made in 1860; so that, when the rejected deed of Knight was made to Hoffman, when the survey made by Maxwell and reported to the court by him, on the 24th day of March, 1866, and when the order of the court that it should be recorded was made by the judge, the law under which they all acted was repealed, and all that was done was therefore null and void. So the court properly rejected the deed. Smith's Comm.ts page 887. Sects: 765-6&7

The 6th and last exception is to two instructions, which were asked for by the jury after they had retired.

The court gave three instructions, but the two last were the subject of exception, found in page 97, in these words:

"2d. And if they further believe that the plaintiffs, or those under whom they claim, took charge of the lands within the grants to Jabez Bacon in 1817, and exercised authority over them, and that in 1826 they took actual possession of the same, and have so continued in possession of the same up to the institution of this suit, claiming them as their own under the Bacon grants and the deed to Peter Smith, paying all taxes duly assessed and charged against them on such lands, and all taxes that ought to have been assessed and charged against them, then the Bacon lands (if) forfeited as aforesaid to the Commonwealth, became and were actually invested in the plaintiffs, or those under whom they claim, in October, 1834, under the act of 1832. But if the taxes assessed and due upon the lands against Smith do not amount to ten dollars, they are released by the act of 1832.

"3d. That if the jury believe from the evidence that the land in controversy was covered by grants to John Reed as

well as by grants to Jabez Bacon, and that the grants to Reed were the oldest, and that under the act of 1835 they became forfeited for non-entry, and that said forfeiture was absolute in November, 1836; that the plaintiffs were the *bona fide* occupants of the land in controversy, or any part thereof, claiming title to the same, and that they have paid all taxes duly assessed, charged or chargable against them, from the time when they acquired their title thereto; that the lands in controversy so forfeited in the name of John Reed, under the act of 1835, became transferred and absolutely vested in plaintiffs, or those under whom they claim, and that if the taxes charged against Peter Smith on the Bacon lands before 1832, were delinquent for less than ten dollars, they were released by law."

To these instructions the defendants excepted. At the close of the exceptions the court adds: "And the evidence set forth in defendant's other bills of exceptions is by the court made a part of this, and therewith his bill is so signed, sealed, and made a part of the record."

It is contended that these instructions, if not literally, are substantially in conformity to law. (Supplement to Rev. Code of Va., 349, sections 8, 9, 10; same, 357, section 2; session act of 1835, page 12, section 3; acts generally of Va. from 1831 to 1849, when the code was adopted.)

BENJ. H. SMITH,
Counsel for Appellee.

CHARLES SHUTTE, Plaintiff in Error.

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Reply to Brief of Defendant in Error.

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The question as to the functions of Township Justices in West Virginia, is whether they are Judges of "County Courts" or "Courts of Common Pleas" —not whether they are justices of Courts of record.

There is no indication that Hardman, before whom Underwood's deposition was taken on the 4th day of August 1864, was ever a Justice of the peace of Virginia, and as such a Judge of the County Court of that State. If he had before been such Justice of the peace, after the creation of the new State and the adoption of the Constitution, he could not have continued to be a Judge of such a Court—for there was none.

What was called the schedule to the Constitution of 1863, was by a subsequent ordinance of the convention that made it, in terms, repealed. But this, it is supposed, is not material.

Under this ordinance passed on the 19th of February 1863, on the 4th Thursday in May 1863, the election of officers was held, and on the 20th of June 1863, the State was organized, and the Legislature and other functionaries of the government commenced the performance of their duties. In September of the same year the Legislature provided for Township meetings, and early in December provided for the election at the first meetings of Justices for the Townships.

These public acts of the State, if material will be judiciously noticed by the Court that administers its laws.

The authority to take the deposition of Underwood in this case was entirely statutory. No Court has the power to dispense with the requirements of the act of Congress on the subject. It is supposed the District Court for West Virginia never made a rule intended to have such effect If the Court did, the rule was null.

According to the 4th, 5th, 6th, 7th and 9th sections of the 37th chapter of the Code of Virginia of 1849, the land charged with tax not paid was sold and the bidder purchased it. A right was vested. This was witnessed by a writing signed and delivered, as well as by public record. By 15th, 16th and 22d Sections of the chapter, it was provided that, when the land was not redeemed, after the expiration of two years, the purchaser might, at any time, have a report made and obtain a deed for the land, and cause it to be recorded, and that thereupon unless the land was redeemed before the deed was made —the estate of the party charged should stand vested in the purchaser. This was the contract made by the Sheriff, acting for the Commonwealth and the owner, with the purchaser. (The sections referred to are those of the Code of 1849. By the interposition of the 3d section, the numbering is different in the Edition of 1860. This is the discrepancy referred to in the Brief.)

Because the Legislature by the act passed in the year 1863, had provided for perfecting the title to lands sold in 1860, it did not by the act of 1866 make such provision; tho' it did so as to lands sold in 1865. If this were less manifest than it is, the notion urged in the brief, that the repeal of a statute, or even its re-enactment, extinguishes the rights acquired and vested while it was in force, it is supposed will not prevail.

The repeal of a law authorizing the enforcement of a contract or completion of a right, without day, if effectual is not a mere limitation of the remedy, but a destruction of the obligation of the contract, and a subversion of the right.

The whole tract of land was necessarily sold to command the tax, because of the want of, or question about the title, and the litigation it promised.

Even if the title had been valid and unquestioned, the statute expressly authorized the sale of the whole tract for the tax of one year; while another statute fixed the proportionate value of the tax to that of the land.

The Supreme Court of Appeals of West Virginia, in the late case of Goshorns *vs.* Friend and others, unanimously sustained such a sale, though the proceeding was irregular (See manuscript copy of opinion.) That inadequacy of consideration will not —especially at law—vitiate a sale of land for taxes, is well settled.

But with the effect attributed in the brief to the legislation in question, it would as completely annul a sale and destroy the right acquired under it, where but a small quantity of the land was sold for its full value—though the purchaser could not recover the money paid—as where the price was but nominal.

It is conceded in the brief, that the powers and duties by the 37th chapter of the Code conferred on the County Court and its clerk, were by the act of 1863 conferred on the Circuit Court or Judge in vacation. Perhaps before, under the operation of the Constitution, and at any rate after the passage of this act, so much of the 37th chapter as related to these matters was not in force; but the act of 1863 was, the law that pertained to them.

When so much of the 37th chapter as remained operative prospectively, was, by the act of 1866, repealed, the efficacy of the act of 1863, for the perfection of vested rights, was certainly not thereby im-

paired. If the Legislature had had the power, it is not to be supposed it intended so to obliterate the legislation on this subject, as directly or indirectly to destroy or defeat the right, while it may be understood to allow the completion and security of the right.

There was no proof of any deed from Jabez Bacon, or any transmission of title mediately or immediately from him to Peter Smith, as to any interest greater than an undivided eighth part of the land; and no indication in the instructions that any such proof was necessary for any purpose. Peter Smith had not at any time any just title or claim to more than one eighth. Consequently, if he himself had not been in default, and his claim from the Commonwealth had been uninterrupted by the forfeiture, still, by the act of 1831, or 1835, no matter from what source the title was derived, or what title was transferred, it could only be for "so much"—one undivided eigth part of the land, or less. Yet the Court by the instructions indicated that this was enough to occasion the transfer to him the title to the entirety.

Even if the possession and other circumstances were sufficient to warrant the jury, in their judgment, to infer that the title was in Peter Smith to a greater extent, the Court did not intimate to the jury that such an inference must be made before the conclusion that title vested in him could be adopted.

If Peter Smith was not the owner of the land in whole or in part, the Plaintiffs had no case whatever. If he was the owner in whole or in part, it was for his default that the land or the part owned by him was forfeited, and he was of the class expressly excepted from the holders or claimants to whom any forfeited title might be transferred.

Peter Smith was himself "the defaulting owner" not his "vendee." And so the question does not occur, whether such a vendee, who does not hold by a claim from the Commonwealth, but merely by the

fragment of a claim severed by the forfeiture, is within the scope of the Commonwealth's donation.

But Peter Smith never paid the tax for the year 1826. The taxes charged to Bacon and that to Smith, successively, for all which the land was returned delinquent, exclusive of damages, exceeding ten dollars, were not released. Consequently the title which was forfeited, as properly assumed in the first instruction, could not vest in Peter Smith as indicated in the second and third instructions.

The title could not have vested in any one else in 1834 or 1835, as asserted or indicated in the instructions; because Peter Smith did not part with his claim during his life, and died in 1837, and his heirs did not part with their claim till 1853, when they made the deed to the Oberlin College. No supposition of payment of taxes by the College is, or could have been properly made to support a transfer of the forfeited title, as in the instructions was hypothetically asserted.

JOHN S. HOFFMAN,
Counsel for Plaintiff in error.

Supreme Court of the United States.

ADDITIONAL BRIEF

IN THE

Supreme Court of the United States,

IN THE CASE OF

CHARLES SHUTTE,

PLAINTIFF IN ERROR,

vs.

URIAH THOMPSON, et al.,

DEFENDANTS IN ERROR.

PREPARED BY BENJ. H. SMITH,

FOR DEFENDANTS IN ERROR.

In preparing this additional Brief I have, for convenient reference, reprinted as a part of this the original Brief for the Plaintiffs below, which is as follows:

This is an action of ejectment tried in the district court of the United States for the district of West Virginia, holden at Clarksburg.

The questions for decision in this court arise out of six bills of exceptions, taken to the rulings of the court in the progress of the trial of the cause.

The first bill of exceptions is to the opinion of the court,

allowing the deposition of W. Underwood to be read to the jury, (page 19.) The facts upon which the court allowed the deposition to be read are stated by the court on page 19 of the record. The defendant in error, to sustain the opinion of the court, relies on the following authorities: 3d Cranch, 297; Buddiman vs. Kirk; Rich vs. Lambert, 12 How., 347.

By a remark of the judge, the laws of the State where deposition is taken, may be referred to; the deposition in Virginia is good. (See code of Virginia 1860, sect. 23.) The rules of the court, in district court of West Virginia, adopt the laws of the State so far as not repugnant, &c. (7 Wh., Evans vs. Eaton, 356; 11 Howard, 392, 393.)

The second and third bills of exceptions are identical. The first is for error in admitting the deed of Nathaniel Bacon to Philo Murray to be read to the jury, dated in 1815. The second for admitting the deed of Murray to Peter Smith, dated in 1815. Each were acknowledged before the district court of the United States, holden at New Haven, Connecticut. For second exception, see page 20; third exception, page 35.

The law of Virginia provides that a deed acknowledged by persons residing in any of the United States, before any court of law, and certified by the court shall be admitted to record, a copy of which shall be evidence. (1st Rev. Code of Virginia, page 371; Chapman vs. Smith, 10th Gratton; Hasler vs. King, 9th Gratton.

The fourth bill of exceptions begins on page 27 and ends on page 78. The defendant offered in evidence plats and certificates of thirty-three surveys made for Thomas Laidley, one for Richard Mason, one for Wm. Barclay, one for John Lyne, and one for Joshua Jackson, and five patents to John Reed, numbered respectively, 18, 25, 26, 27, and 28. He also gave in evidence the plat of surveyor Sherwood, and evidence tending to prove the lands of Laidley were correctly laid down as shown by the map; and among other proof, offered to prove by witness, who had lived many years in the neighborhood of said T. Laidley's survey No. 1, that the poplar corner represented on the plat by letter A was and had been for many years reported in the neighborhood as the poplar beginning corner of Laidley's survey No 1. The plaintiff objected to

CHARLES SHUTTE, Plaintiff in error,

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Addenda to Argument and Laws.

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VALIDITY OF THE TAX DEED.

[Page 12 of Argument.]

In the case of Goshorns *vs.* Friend and others, decided by the Supreme Court of Appeals of West Virginia, in February last—not yet reported—it appeared that a tract of land was charged with and returned delinquent for the non-payment of tax for the year 1850, and sold in the year 1855 for the non-payment of that tax; but the caption of the list of the real estate sold was this: "Mem. of real estate within the county of Kanawha, sold in the months of September and October 1855, for the non-payment of taxes since the year 1850." The oath of the Sheriff related to real estate sold for taxes since 1850. And there was nothing in the list or the oath of the Sheriff—which was his only return—indicating that any land was sold for tax for the year 1850, or any year previous to the year 1851; but the list, by implication, negatived any sale for any such tax. (Printed copy of record of Supreme Court of West Va., p. p. 22, 3.) In this case the Judge delivering the unanimous opinion of the court said:

"The deed from A. W. Quarrier, as Clerk of the Circuit Court of Kanawha county, to Wm. R. Cox was made pursuant to section 16, chapter 37, page

203, Code of 1849, and shows upon its face strict compliance with the requisitions of said section, and is *prima facie* evidence of such title, as according to the 22d section of said chapter, it purported to vest in the purchaser at such sale, liable to be questioned for any irregularity appearing on the face of the proceedings. (Flanagan *vs.* Gimmet *et als* 10 Gratt. 421. Hobbs *vs.* Shumates 11 Gratt. 576.) The *onus probandi* is cast upon the contesting party, to show by the face of the proceedings such irregularity as affected the validity of the deed. (*Idem.*)

"The objections made to the certificates and affidavits of the Sheriff, are matters of form merely, and are not such irregularities as would vitiate the sale and impeach the deed, because, though defective in form they nevertheless comply substantially with the statute. The expression used by the Sheriff in his certificate and affidavit, viz: "*Since the year* 1850," is clearly a misrecital, as is fully shown by the face of the proceedings; as for instance, in the said affidavit he states, "for the non-payment of taxes thereon, *since* the year 1850, as per list certified to me by the Auditor," etc. By reference to the Auditor's list it appears the land is delinquent in the name of Thomas L. Hutton; number of acres 3.375; location, Blue Creek; year 1850; tax 84 cents; total tax and damage $1.04, which corresponds exactly with the memorandum and receipt of the Sheriff to the purchaser Wm. R. Cox, and in which the Sheriff states positively and distinctly 'for the non-payment of taxes thereon for the year 1850,' and also corresponds precisely with the list of land tax in the Commissioner's land book for the year 1850, filed in the Clerk's office of Kanawha county. It seems to me that it plainly appears upon the face of the proceedings, that the land in question was sold for taxes due thereon from Thomas L. Hutton, for the year 1850, and that all the prerequisites of the law have been substantially complied with, and that the difference

in the wording of the forms, used in the certificates and affidavit, from those of the statute, do not show irregularity of the proceedings, but merely informality in the statement of proceedings, which were in all respects regular.

"There does not appear from the record in this cause any reason sufficient to justify the Circuit Court in setting aside and annulling the said deed; and there was error in doing so. Therefore, the decree complained of should be reversed with costs, and the cause remanded." (Manuscript opinion of Court, produced.)

Title not transferred to the party for whose default it was forfeited.

[Page 34 of Argument.]

In the present year, 1872, the convention to frame the new Constitution of West Virginia, considered this subject most earnestly and laboriously, and finally adopted, and the people ratified provisions transferring the title to lands forfeited, not to those for whose default the lands were forfeited, but to other meritorious claimants. Constitution, Art. 13 Sec. 3 and 6.

[Provisions of the new Constitution as to the transfer of the State's titles to forfeited lands, to claimants (other than those for whose default they were forfeited) under grants other than those of the titles forfeited.]

ARTICLE XIII.

Land Titles.

3. All title to lands in this State heretofore forfeited or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited or treated as forfeited or escheated to this State, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much thereof as such person has, or shall have had actual continuous possession of,

under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the State taxes thereon for any five years during such possession; or if there be no such persons, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have title or claim to, regularly derived, mediately or immediately from or under a grant from the Commonwealth of Virginia or this State, not forfeited, which but for the title forfeited would be valid, and who, or those under whom he claims, has, or shall have paid all State taxes charged or chargeable thereon for five successive years, after the year 1865, or from the date of the grant if it shall have issued since that year; or if there be no such person as aforesaid, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have had claim to and actual continuous possession of under color of title for any five successive years after the year 1865, and have paid all State taxes charged or chargeable thereon for said period.

6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it or a part of it is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if for any one or more of such five years, the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman or insane person, may, until the expiration of three years after the removal of such disability, have the land or such interest charged on such books, with all State and other taxes that shall be and but for the forfeiture would be chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: *Provided*, such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited.

[Extract from a case showing that by the Supreme Court of Appeals it was considered that the forfeited title enured only to claimants under "other grants" than that of the forfeited title.]

Smith et al v. Chapman, decided in 1853, 10 Gratt. 445—sec. 469.

The acts declaring the forfeiture of lands for the failure of the owner to comply with the revenue laws, were sufficient *proprio vigore* to work out their own purpose, and to transfer the title to those claiming under another grant, who were in a condition to avail themselves of the provisions for their benefit.

[Page 34 Argument.]

In the year 1849, before Judge Lee, in the Circuit Court of the County of Randolph, a case was tried in which these facts appeared:

In the year 1790 the Commonwealth of Virginia, granted to Daniel Jenifer Adams two tracts of land in the county of Randolph—one of 2500, and the other of 1000 acres adjoining each other. He died and the lands descended to his heir Josias Adams. In the year 1836 the county of Braxton was formed; but the line between that and the county of Randolph was not run till after the transactions that will be mentioned. The lands were situated nearly equidistant from the Court Houses of these counties, near the mathematical line that divided them, in a wilderness sparsely settled, between the few inhabitants of which and of the Court Houses of the two counties there was little intercourse. In March in the year 1836, an act was passed extending the time till the first day of November in that year, within which omitted lands might be charged with taxes, and the taxes might be paid, so as to prevent the forfeiture of the lands. Acts 1835–6, ch. 3, s. 1. On the 3d day of October, in the year 1836, Josias Adams, under the belief that the lands were situated in the county of Braxton, caused them to be charged on the land books of that county with the taxes from 1811 to 1836 inclusive and damages, and paid these taxes and damages to the Sheriff of that county. And he continued to pay the taxes on the lands in Braxton county until and including the year 1842.

In the year 1843, Josias Adams made a deed for the conveyance of the lands to Preston M. Adams. And in the same year, and in each of the years thereafter, until the time of trial, he was charged on the Land Books of the county of Randolph with the taxes properly charged on the lands, and paid these taxes. In the year 1844, a grant from the Common-

wealth of Virginia to David Hamrick, issued for a tract of land containing 150 acres, which is part of these lands. In the year 1845 and each year thereafter, he was charged with and paid the taxes chargable thereon. In the year 1846 the act was passed declaring that the title of the Commonwealth to lands theretofore or thereafter forfeited, should be, by the act, absolutely transferred to and vested in persons (others than those for whose default the lands might have been forfeited their heirs or devisees) for so much as such persons might have just title or claim to, held or derived under grant from the Commonwealth theretofore or thereafter issued, who should have paid the taxes duly assessed thereon, from the time they acquired their title thereto. Acts 1845–6, ch. 6, s. 3, p. 14. The language of this provision was identical with that of the eighth section of the Act of 1831, as far as the question whether the Act transferred the forfeited title to the claimant of that title, who had paid his taxes from the time when he acquired his title or claim.

Hamrick, in the name of a fectitious lessee, brought an action of ejectment against Doddrill, a tenant of Adams, in possession of a part of the lands. The Circuit Court held that the charge and payment of taxes and damages by Josias Adams, in the county of Braxton, was not sufficient to prevent the forfeiture of the lands; that under the act of 1835 they were forfeited; that the title did not vest in Preston M. Adams, the claimant under the same grant, the title under which was forfeited, who had properly paid all the taxes chargable to him on the lands from the time when he acquired his title or claim thereto: But that the title, to the extent of the tract of 150 acres, was transferred to and vested in Hamrick, who claiming under another grant, had paid his taxes. And Hamrick's lessee recovered the possession of the land. The holding here attributed to the Court, was necessary to the judgment given. In the year

1853, when the Supreme Court of Appeals consisted of five Judges, of whom Judge Lee, who decided the case in the Circuit Court was one, upon a writ of error, the other four Judges were equally divided, and the judgment was affirmed. The two Judges who dissented, however, held that the charge to, and payment of taxes and damages, by Josias Adams, under the circumstances, in the wrong county, prevented the forfeiture of the land: Not that the payment by Preston M. Adams occasioned the transfer of the forfeited title to him. (The transcript of the record and printed copies used in the Supreme Court of Appeals are mislaid, but a transcript from the Circuit Court, and from the judgment of the Supreme Court are procured and produced.)

This case is in this respect similar to the case in judgment. As it was decided by a Judge of the Circuit Court who went thence to the Supreme Court of Appeals, and while he was a Judge of the latter Court, was decided and affirmed by a division of the other Judges. The case is authority. 7, Howard, 754; Gilson *vs.* Buckhannon, 16, Gratt. 321—Sec. 328.

JOHN S. HOFFMAN.
Counsel for Plaintiff in error.